

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE

AUDIT OFFICE

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CALIFORNIA TOMATO COMMISSION

AUDIT REPORT #06-070

CALIFORNIA TOMATO COMMISSION

AUDIT REPORT

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The California Department of Food and Agriculture (CDFA), Division of Marketing Services, Marketing Branch requested the Audit Office to perform a limited scope fiscal and compliance audit of California Tomato Commission (Commission.) The objective of this audit was to determine whether the Commission was operating in the best interests of the public.

The audit scope was limited to the fiscal years 2003/04, 2004/05, and 2005/06. Although our scope was limited to these three years, our office expanded our scope to include information that covered other years if it was readily accessible and/or may have assisted our office in understanding a particular issue. This occurred if during our three year period, our office noted any potential problems that needed to be further analyzed. Our scope focused primarily on the Commission's expenses. Our scope also included the Commission's compliance with various rules and regulations that pertain to it.

To accomplish the overall audit objectives, our audit methodology consisted of, but not all inclusive of, the following:

- Review of the Commission credit card statements.
- Review of the Commission's general ledger detail and various financial related documents.
- Conversations with the Commission's staff.
- Review of the internal controls.
- Review of the Commission's compliance with various rules and regulations.

It should be noted that our limited scope audit was performed because our office was put on notice regarding alleged inappropriate behavior described in a lawsuit.

We conducted our audit in accordance with Generally Accepted Government Auditing Standards, issued by the Comptroller General of the United States.

This audit report is intended solely for the information and use of the management of the CDFA and Commission and should not be used for any other purpose.



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EXECUTIVE SUMMARY

The California Department of Food and Agriculture (CDFA), Division of Marketing Services, Marketing Branch requested the CDFA Audit Office to perform a limited scope fiscal and compliance audit of the California Tomato Commission (Commission) to determine whether the Commission was operating in the best interest of the public as required by the Food and Agriculture Code. In order to accomplish this, our primary focus was the Commission's expenses and its compliance with various rules and regulations.

The Commission did not keep adequate records and furthermore did not provide all of the documentation that our office requested. To complicate matters, Employee A was recused from our audit before the second week of fieldwork began. Therefore, the liaison between our office and the Commission was Individual #2 from Company A, the Commission's legal counsel. However, we were still able to identify multiple issues that need to be investigated and further explained. The issues are noted as follows:

- Our office is concerned that the Commission and the private "agricultural cooperative," the California Fresh Tomato Growers Exchange (Exchange) appeared to operate as identical in interest and organizationally on many occasions. This concern was raised when we analyzed their use of many of the same staff, board members, office space, attorneys, accountant; use of Commission's bank account to pay for both entities' expenses; use of the Commission's general ledger to record Exchange transactions; and the Commission entering into contracts with local government entities on behalf of the Exchange.

For example, our office noted that the Commission had paid \$48,000 to a website design firm that was recorded as an expense of the Commission. However, our office noted that \$5,585 was related to the website design of the Exchange. Employee A acknowledged that an error had occurred and the Exchange reimbursed the Commission for this portion of the cost, after our office informed the Commission. In other instances, our office observed legal fees totaling \$6,800 that were invoiced to the Exchange but were paid for by the Commission. Although these invoices were titled, "California Fresh Tomato Growers Exchange", someone had crossed this out and wrote "Commission" and "Tomato Commission" on the invoices. These are the internal control weaknesses that are exposed when you have two businesses so closely related that it becomes difficult for their own staff to differentiate between an expense of one company versus the other.

Furthermore, a concern is raised about the possible conflict of interest since Employee A managed both the Commission and the Exchange and many of the board members served on both boards. Based on the Commission's payroll records and the independent contractor's agreement between Employee A and the Exchange, the Commission annually paid him over \$100,000 as the President and the Exchange annually paid him \$30,000 as a consultant for management services during the same time period.

The above information along with unexplained differences in documents we received by both entities raise concerns for our office. Therefore, the proper authorities should investigate these issues.

- The Commission paid for expenses related to the start up of another private company, California Tomato Research Foundation (Foundation). The expenses included those related to legal fees and website design. Per Employee A, during the formation of the Foundation, a majority of his expenses to Sicily, Italy were paid for by a seed company, Company E, which was to be involved with the Foundation. According to Employee A, Company E paid for Employee A's expenses at a time when he was also managing and being paid by two other entities, the Commission and the Exchange. We are not able to determine whether Employee A received additional income from his consulting business in 2005, as he did in 2002. These facts raise various concerns, one of which is a possible conflict of interest, and, more fundamentally, how many entities can one man manage/serve. Therefore, the proper authorities should investigate these issues.
- The Commission held annual conferences that used Commission monies for expenses that we do not believe to be in the best interest of the public. During the time period, 2001 through 2006, the annual conference's income totaled \$350,604, while expenses totaled \$479,186, for a net deficit over the six-year period at <\$128,582>. Although the intention of the Commission may have been to operate a self-sufficient conference, year after year conference deficits indicate that this was not a reality and that assessment dollars were used to cover the shortfall. The Commission primarily operates one bank account of which both conference income and assessment payer fees are collected and deposited. Since the conference income collected was not sufficient to pay for the related expenses incurred, it becomes evident that assessment payer fees were used to pay for these expenses. Not only were the destinations such as Cabo San Lucas, Mexico, and Arizona unnecessarily expensive, many of the expenses were questionable. These expenses call into question the rationale, value, and business purpose of annually spending between \$67,000 and \$90,000 to hold a conference that had incurred repeated deficits in distant locations for basically a day and one half of business related activities.
- According to the Commission's records, many of the employees used the Commission credit card to pay for personal expenses. Some of the amounts were reimbursed while other expenses were not. Therefore, a possible gift of public funds may have occurred with Commission monies.
- We noted that the Commission spent monies on various items that appeared to be excessive and not in the best interest of the public.
- The Commission paid \$45,000 to Individual #1, driver for Company C, for advertising displayed on his truck while competitively racing in organized races. His co-driver was and is Board Member A who also drove the truck during races. Board Member A was also a board member during the time that the Commission gave monies to Company C.
- We noted possible violations of the Public Records Act, the Public Contracts Code, and open meeting laws.

- Other issues such as unsupported salary payments and internal weakness are also noted in our report.

Our office does not believe the Commission acted in the best public interest on many occasions and our report will explain the multiple issues that have been briefly described above.

KEY RECOMMENDATIONS

- Due to the seriousness of the issues raised, the Commission should contact the proper authorities so that investigations into these issues may be performed.
- The Commission should ensure all conference related income and expenses are fully disclosed at gross in the annual budgets submitted to CDFA for concurrence and the financial statements sent to all assessment payers.
- The Commission should review all prior year conference related expenses and determine the total amount spent on the family members and friends of employees and the personal amounts spent by employees. The Commission should establish an accounts receivable and seek reimbursement of these expenses.
- The Commission should operate their business activities in the best public interest.
- The Commission should keep adequate support for all expenses incurred. At the very least the Commission should ensure that a receipt/invoice is kept on file along with the names/business conducted, if appropriate.
- Prior to contracting for the use of a private aircraft for travel related purposes, the Commission should perform a detailed cost-savings analysis that documents and demonstrates the necessity and benefit expected in using assessment dollars to charter a private aircraft. The analysis should clearly identify the savings expected to occur in chartering a private aircraft versus other travel options.
- The Commission should not allow its staff to use Commission credit cards for personal use.
- The Commission should strengthen its internal controls over the use of these credit cards.
- The Commission should contact the federal government to determine the appropriateness of the use of federal funds, specifically as it relates to Board Member A and Company C.
- The Commission should verify that the total salary paid to Employee A from 2003 through 2006 is appropriate.
- The Commission should collect reimbursement from any employee who was paid for their vacation time in violation of their own internal policy.
- The Commission should seek further guidance from the proper authorities on handling a violation of an open meeting law. The Commission should disclose all business meetings to the public in accordance with the appropriate open meeting laws.

- The Commission should seek guidance from the proper authorities as it relates to its violation(s) of the Public Contracts Code.
- The Commission should ensure all executive committee minutes are signed and dated by one of the three Board Elected Officer's along with the President of the Commission.
- The Commission should ensure that all official accounting records, including certified copies of Board Minutes are centrally located and easily accessible to the public.
- The Commission should adhere to the rules of the Public Records Act. In order to accomplish this, the Commission should have all records readily available to the public.
- The Commission should contact the proper taxing authorities to ensure the Commission properly tracked and reported its employee's car allowances. Furthermore, the Commission should require that employees submit monthly travel logs that indicate the business mileage driven and/or the actual maintenance incurred.
- The Commission should contact the proper authorities responsible for determining whether the amounts paid to Employee D are appropriate. This will ensure that the Commission is not providing Employee D with a gift of public funds.

REPORTABLE FINDINGS

RELATIONSHIP BETWEEN COMMISSION AND EXCHANGE

During the course of the audit, our office became aware of an unusual relationship that existed between the Commission and the California Fresh Tomato Growers Exchange (Exchange) that raises concerns regarding possible conflicts of interest as well as internal control weaknesses. Although the Exchange is a private “agricultural cooperative,” the Commission and the Exchange appeared to operate like they had identical interests and were one in the same organizationally. When we analyzed their use of many of the same staff, board members, office space, attorneys, accountant; use of Commission’s bank account to pay for both entity’s expenses, use of the Commission’s general ledger to record Exchange transactions; and the Commission entering into contracts with local government entities on behalf of the Exchange; the separateness of their identities became confused and merged.

At the same time that the Exchange and the Commission operated as if their interests were identical and they were organizationally the same, the Exchange did not, in fact, represent the interests of all assessment payers. The Commission assessments are mandatory for all growers (over 400) and handlers (over 30). However, the Exchange appears to have been composed and led principally by 4-5 handlers and related growers who together produced, according to some estimates, 90% of the product for market. Two significant handlers, Individual #4 and Company B did not belong to the Exchange although their businesses were assessed hundreds of thousands of dollars in assessment money for the Commission during the existence of the relationship between the Exchange and the Commission documented during the audit. While the Exchange represented the interests of only a portion of the industry, all of the industry paid for the activities that included those that supported the Exchange and the Exchange appeared to have access to the information of all assessment payers.

Our office attempted to gather more information that would allow our legal counsel to make a determination on these critical issues. However, neither the Commission nor the Exchange provided all information that was requested or needed to make such a determination. To further complicate matters, the Exchange mailed documents to our office that appear to contradict records that were obtained by our office from the Commission and/or what individuals interviewed told us. In one instance, the Commission provided a Memorandum of Understanding (MOU) that was much different than the MOU that we received from the Exchange (*Please refer to Appendix A for a copy of the MOU received from the Commission and Appendix B for a copy of the MOU received from the Exchange*). In another instance, our office requested a copy of the independent contractor agreement between Employee A and the Exchange. The Commission’s version of the agreement was clearly signed at a different time than the one our office received from the Exchange (*Please refer to Appendix C for the copy of the agreement we received from Employee A during our first week of fieldwork and please refer to Appendix D for a copy of the agreement we received from the Exchange*). Once again these discrepancies raise concerns regarding their authenticity and whether or not the Commission or the Exchange had a clearly defined relationship. After repeated attempts to gather information from the Commission and the Exchange regarding the original MOU and the subsequent three amendments to the MOU, our office cannot determine their appropriateness. Although our office was not able to obtain all the information requested, the following

information may be beneficial to all parties, including but not limited to the assessment payers, as it relates to this relationship.

- Based on the Articles of Incorporation for the Exchange obtained from the Secretary of State's Office, the Exchange was incorporated on April 4, 1997 and is for the purpose to engage in any cooperative activity in connection with the producing, marketing or selling of agricultural products for its members. Board Members A, D, F, and G signed the Articles of Incorporation on March 20, 1997. The first amendment dated April 21, 2004 listed Employee A as the CEO, Board Member B as the Secretary, and Board Member C as the Chief Financial Officer. Additionally, the second amendment dated March 2, 2005 listed Board Member C as the CEO, Board Member B as the Secretary, and Employee A as the Chief Financial Officer. It should be noted that Board Members A, B, C, D, and G were also board members of the Commission.
- Employee A managed both the Commission and the Exchange. Based on the Commission's payroll records and the independent contractor's agreement between Employee A and the Exchange, the Commission annually paid him over \$100,000 as the President and the Exchange annually paid him \$30,000 as a consultant for management services. According to our conversation with Employee A during the first week of our audit, he stated that he conducted the Exchange's business from 6am to 8am and nights and weekends. This does not appear to be accurate based on the documentation we reviewed.
- Our office noted that the Commission and the Exchange were so closely related that the Exchange's business was actually conducted during Commission Conferences at destinations, such as Cabo San Lucas, Mexico for two of the past three years (2003/04 and 2005/06) and Huntington Beach in 2004/05. For instance, based on the Commission's agenda for its 2004/05 Commission Conference, the Exchange's board of director's meeting took place from 8:30am to 12:00pm. The Exchange board meeting of 3 ½ hours was actually longer than the Commission's executive committee meeting that was scheduled for one hour and the Commission board meeting that was scheduled for two hours on the same day. Based on the agenda, the Exchange business represented about 25% of the Conference meeting/workshop/sessions over the three day period.
- According to Employee B, she was the bookkeeper for both entities. Employee B was paid \$55,000/year from the Commission and was also paid \$50/hr from the Exchange. Employee B stated that she worked on the Exchange records after hours and on weekends. Although the \$50/hr was verbally communicated to our office by Employee A and Employee B, our office was not provided with any other evidence to support this.
- Many of the Commission's board members also served on the Exchange's board. This was very evident when our office identified agreements between the two entities that were signed by a mutual board member, as was the case when Board Member C signed Employee A's independent contractor's agreement as the Chairperson for the Exchange. At the same time, he was a member of the Commission.
- The Commission recorded the expenses of the Exchange on the Commission's general ledger. After the Commission made the payment, the Exchange would subsequently reimburse the Commission for these expenses. However, we identified the Exchange expenses that were misclassified as Commission expenses in the Commission's general

ledger. Furthermore, our office is unable to determine how much, if any, is owed to the Commission by the Exchange for services performed under the MOU because we have not received all of the amendments that were requested.

- The Commission and the Exchange entered into agreement(s) with each other. The Commission also entered into contracts with local government agencies on behalf of the Exchange.
- The Commission paid approximately \$6,000 in legal fees to Company A on behalf of the Exchange which was a legal firm for both entities. In other instances, our office observed legal fees that were invoiced to the Exchange but were paid for by the Commission. These invoices amounted to \$6,800. As of November 17, 2006, there is still an outstanding balance owed by the Exchange to the Commission for legal fees the Commission already paid.

As previously mentioned, the Commission was incurring expenses on behalf of the Exchange. The Commission had established an account in its general ledger that was used to track the amount of expenses incurred and it paid on behalf of the Exchange. According to the Commission's records, it has paid approximately \$105,000 of the Exchange's expenses since 2003/04. The Exchange subsequently reimbursed these amounts. Our office noted payments for many different items including phone and internet usage, hotels, insurance, car rentals, airline tickets, contracts, and legal fees. Our office questioned Employee A as to the appropriateness of using the Commission's credit cards and check stock to make payments on behalf of another company, as well as recording these expenses in the Commission's general ledger. Employee A informed our office that a Memorandum of Understanding (MOU) existed that explained the relationship between the two entities.

Employee A provided our office with the latest amendment dated May 31, 2005 attached with the original MOU dated April 1, 1997 during our first week of fieldwork. The 1997 MOU states that the Commission shall provide the Exchange with storage space, access to a copier and postage meter, and related office supplies. Additionally, the 1997 MOU states that the Commission shall invoice and the Exchange shall pay the Commission for out-of-pocket or other expenses advanced by the Commission over and above that for space and the use of office equipment. However, the Commission did not provide us with any invoices that were submitted to the Exchange. Furthermore, the May 31, 2005 amendment was drastically different than that of the original agreement, especially as it related to the nature of the responsibilities of both parties. The amendment stated,

"In response to the on-going gunnysacking problem, the Exchange will deposit with the California Tomato Commission prior to June 15, 2005, the amount of \$160,000; these funds will be held segregated from other funding received by the Commission, and shall be used to support county and state surveillance of fresh and processing tomato fields, flea markets, terminal markets, and other venues where illegal harvesting or marketing of fresh tomatoes may take place."

Additionally, it states,

“The Commission shall establish the infrastructure and contract with the appropriate state and county agencies to ensure that the enforcement is done on an efficient and cost effective manner.”

The amendment was signed by Board Member C, Chairman of the Exchange, and Employee A, President of the Commission.

Since the Commission and the Exchange would not provide additional information regarding the MOU or the amendments to the MOU, the following information represents our understanding of the agreement that was provided to us by the Commission:

- The 1997 MOU appeared to be primarily an agreement for office space, equipment, and supplies. However, based on our review of the Commission’s payments (hotel, legal fees, etc.) made on behalf of the Exchange, it appears that the relationship between the two entities was more than what was explained in the 1997 MOU.
- Although the MOU stated that \$160,000 would be deposited with the Commission, our observation of the Commission bank records indicated that these funds were never deposited with the Commission. This was the same amount that Employee A told Individual #3, of Company B, was deposited in the Commission’s bank account (*Please see Appendix E*). Once again, this was not true based on our analysis. However, our office did observe multiple contracts that were entered into between the Commission and various local county governments for surveillance activities. Therefore, it appears the Commission entered into these contracts on behalf of the Exchange. The Commission paid the county governments approximately \$66,000 for these services that were later reimbursed by the Exchange. Our office also noted that the Commission had entered into contracts in which the Commission was never charged by the county governments. Instead, our office received information from the Commission that additional payments were made directly by the Exchange to the counties.
- Our office observed that Board Member C signed the May 31, 2005 MOU amendment on behalf of the Exchange. It was also noted that Board Member C was also a board member of the Commission at the time he signed this amendment.
- Our office requested the other two amendments to the MOU, but the Commission never provided those to us. Instead, our office observed the board minutes for July 17, 2001 that read,

"In noting the termination of Employee E because of unlawful actions against the Exchange, Employee A noted that his consulting firm had been retained by the Exchange to provide interim management services through the remainder of the year. Under this arrangement, the Commission's relation with the Exchange is to only provide office space and no personnel. Motion: To approve the agreement as written, by Board Member E to approve the Revised Management Agreement with the Growers Exchange, seconded by Board Member I, and passed with none opposed."

Due to the unusualness of the aforementioned points, our office questioned Employee A as to his relationship with the Exchange. Employee A informed us that he was on contract with the Exchange in the amount of \$30,000 plus expenses for management services he was providing the Exchange. Employee A provided us with a copy of a 2006 independent contractor agreement between him and the Exchange during the first week of our fieldwork. He provided this agreement the day after he stated that no such agreements existed. Our office requested for any other contracts that existed for previous years and Employee A stated that the other agreements would be with Board Member C in Manteca, California and no further explanation was given. Although our office was skeptical as to the authenticity of this agreement, we accepted the agreement as evidence of his relationship with the Exchange. It was not until November 16, 2006, that our office became aware that Employee A and Board Member C's signatures did not match those of the original agreement we received, thus raising the issue of when these documents were created and signed *(Please refer to Appendix C for the copy of the agreement we received from the Commission and please refer to Appendix D for the copy of the agreement received from the Exchange)*.

Both contracts were signed by Board Member C, representing the Exchange, and Employee A. Once again, it was noted that Board Member C was also a board member of the Commission. Employee A's duties were stated in the contract as follows:

“Management services which included draft regulations, operation policy, bylaws and other documents to maintain the Capper-Volstead exemption held by the company, collecting and dissemination of industry statistics, staging of conference calls and meetings and recording of minutes, negotiate contracts with County and State offices, and serve as a liaison related to the surveillance and enforcement of Article 43 of the California Food and Agricultural Code, conduct audits of the membership to ensure compliance with approved operational policy, maintaining records, and filing of required documents with federal and state agencies.”

The term of the agreement was from February 2006 through December 31, 2006.

Employee A acknowledged that he had been on contract for a few years. Although our office was unable to obtain the agreements for 2004 and 2005 until November 16, 2006; our office did obtain Employee A's Form 700's during our fieldwork. The following was identified:

- Employee A's Form 700 for 2001 identified him as the President/CEO of the Commission as well as the President of Company D. His Form 700 Schedule A-2 also identified him as a consultant for the Exchange with gross income ranging from \$10,001 - \$100,000.
- Employee A's Form 700 for 2002 identified him as the President/CEO of the Commission. His Form 700 Schedule C also identified him as the President of the Exchange with a salary range of \$10,001 - \$100,000. Schedule C also identified Employee A as a consultant to another entity in which Employee A provided consulting on Mexican Trade laws. Income received for this activity was stated at \$1,001 - \$10,000.
- Employee A's Form 700 for 2003 identified him as the President of the Commission on the cover page. His Form 700, Schedule C also identified him as the President of the Exchange with a salary ranging from \$10,001 - \$100,000. Schedule C further identified him as the CEO of the Commission with a salary range of over \$100,000.

- Employee A's Form 700 for 2004 identified him as the President/CEO of the Commission. His Form 700 Schedule C also identified him as a Consultant for the Exchange with a salary range of \$10,001 - \$100,000.
- Employee A's Form 700 for 2005 identified him as the CEO of the Commission. His Form 700 Schedule C also identified him as a consultant/manager for the Exchange with a salary range of \$10,001 - \$100,000.

Based on the fact that Employee A managed and was paid by both entities, and the closely related activities of both, it became difficult to identify which expenses were those of the Commission versus the Exchange. Since the Commission also recorded and paid the Exchange's expenses, the opportunity for record keeping errors to occur was greatly increased. Not only was the opportunity for error a perception but was also a reality based on a couple of errors noted during the audit. In one instance, our office noted that the Commission had paid \$48,000 to a website design firm that was recorded as an expense of the Commission. However, our office noted that \$5,585 was related to the website design of the Exchange. Employee A acknowledged that an error had occurred and the Exchange reimbursed the Commission for this portion of the cost, after our office informed the Commission. In other instances, our office observed legal fees that were invoiced to the Exchange but were paid for by the Commission. These invoices amounted to \$6,800. Although these invoices were titled, "California Fresh Tomato Growers Exchange", someone had crossed this out and wrote "Commission" and "Tomato Commission" on certain invoices. Based on the summary of charges, it appears these expenses belonged to the Exchange. The Exchange has not reimbursed the Commission for these expenses at the time we concluded our fieldwork. However, Employee A attempted to explain these expenses (*Please refer to Appendix F*). These errors are all internal control weaknesses that occur when one manager, Employee A in this case, oversees two closely related entities and the expenses of both entities are recorded in the Commission's general ledger. The internal control weakness is further perpetuated since the board members are the same for both entities.

To further complicate matters, our office also received an MOU dated June 8, 2001 from the Exchange's legal representatives on November 16, 2006 that is titled "Memorandum of Understanding for Administrative Services between the California Tomato Commission and the California Fresh Market Tomato Growers Exchange." This MOU is signed by Employee A, President of the Exchange, and a Chairman of the Commission. The MOU states,

"The Commission, acting through its staff, shall provide administrative services to the Exchange, the purpose of which is to manage the day to day activities of the Exchange..."

It further states,

"In consideration for the services provided by the Commission to the Exchange, Exchange shall compensate Commission in the amount of \$2,867 per annum."

Since our office does not know which staff the MOU is referring to or the services provided, our office is unable to determine whether payments were made or should have been made to the Commission. Furthermore, this MOU is one month prior to Employee A's consulting firm being hired by the Exchange according to board minutes previously mentioned. This is yet another document we received weeks after our audit fieldwork was concluded. This MOU warrants further explanation.

Furthermore, the Commission's Executive Committee Board Minutes dated June 1, 2002 had a 2002 salary schedule attached to it that warrants further explanation. The schedule makes reference to "Exchange Quarterly Billings" for Employee A and Employee B, adjustments for Employee B's time basis and salary, and "Exchange Cap" (*Please refer to Appendix G*). The question that remains is whether the Exchange owed the Commission monies for these services, and if so, were these paid. Furthermore, if the Exchange was in fact reimbursing the Commission for time worked by Employee A, then our office would need an explanation of why Employee A was paid by the Exchange as an independent contractor.

Although our office has not received all of the information necessary to determine whether any conflicts of interest have occurred, it would not be prudent for our office to ignore the perceptions at this point. Had our office received all of the information regarding this relationship, our office would have worked in cooperation with our legal counsel to make a determination. Based on information already stated, the two entities should have been kept separate and independent of each other, especially as it related to the record keeping.

Recommendation

- 1. Due to the seriousness of the issues raised, the Commission should contact the proper authorities so that investigations into these issues may be performed.*

RELATIONSHIP BETWEEN THE COMMISSION AND THE FOUNDATION

During the January 14, 2004 board meeting for the Commission, the feasibility of establishing a California Tomato Research Foundation (Foundation) was discussed. According to the minutes, Employee A told the board that the primary advantage comes from the tax benefits that donors to the program would receive. Employee A also stated that to form the Foundation would require one year's time and \$6,000 - \$8,000 in legal expenses.

Since that time, the Commission has created and paid for a website as well as incurred legal fees on behalf of the Foundation. According to the Secretary of State's Office, the Foundation filed their Articles of Incorporation on February 1, 2005 which stated the corporation is a nonprofit Public Benefit Corporation. The specific purpose is the corporation is to support research regarding fresh tomatoes including but not limited to, research regarding production and nutrition for the benefit of the public. Once again, our office noted Commission board members were listed as officers of the Foundation.

In an attempt to gain a better understanding of the Foundation, our office requested for additional information from the Commission. On October 30, 2006, our office received a facsimile that was apparently written by Employee A. A few statements from the facsimile are as follows:

- "As noted, the Foundation would provide a tax donation to the supporters, meaning seed companies, etc, - this was the primary benefit of the Foundation."
- "In 2006, the Commission approved funding of the Foundation equal to the program of researcher Individual #5, who is a world class breeder. The Commission wanted the project to run through the Foundation so that royalties could be funded back to the Foundation for the further support of this and other projects."

- “Also during the period of formation, discussion took place with Company E, one of the largest seed companies, about the feasibility of doing proprietary breeding for the California industry and with a share of industry purchases of Company E to be returned to the Foundation to support generic breeding at UC Davis. As a result of these discussions, Company E asked that I attend their world tomato conference in Sicily at primarily their expense in 2005. In 2006, discussion continued with the seed companies (see Cabo Conference) as to the feasibility of royalty streams being developed.”
- “Individual #6 manages the foundation.”

Based on the information observed by our office, we have concerns regarding the potential for conflict of interest issues and/or possible violation of the political reform act.

According to Employee A, a majority of his expenses to Sicily, Italy were paid for by a seed company. However, according to the Commission’s credit card statement, Employee A charged \$7,405 for airfare to Italy in May 2005. Our office is unaware of a reimbursement by Company E to the Commission for this airfare. According to Employee A, Company E paid for Employee A’s expenses at a time when he was also managing and being paid by two other entities, the Commission and the Exchange. This was yet another instance in which Employee A received a benefit from another entity while being paid a salary by the Commission. Without further information, our office is unable to determine if the amount paid to Employee A was a gift and if so whether it exceeded \$300 and/or whether Employee A reported this to the proper taxing authorities if so required. Furthermore, we are unable to determine whether Employee A should have reported this information on his Form 700. Due to the fact that our office does not have a clearer understanding of the relationship between Employee A and the seed company and who or what entities may have benefited from this relationship, we are unable to offer any further analysis.

It should be noted that although the Foundation is a nonprofit corporation, the website expenses and legal fees have been paid for by the Commission, which is a separate entity. Our office did not observe any accounts receivables on the Commission’s records that would indicate the Foundation would be reimbursing the Commission for any expenses already paid for on its behalf. Although these expenses may be appropriate, our office cannot make a determination at this time.

Recommendation

2. *Due to the seriousness of the issues raised, the Commission should contact the proper authorities so that investigations into these issues may be performed.*

COMMISSION CONFERENCES

Our office has concerns whether or not the Commission’s conferences were in the best public interest as referenced in the Food and Agriculture Code. Our office does not consider many of the Conference expenses to be necessary or in the best public interest, including amounts spent on family members and friends of employees for airfare, meals, and lodging to travel to potential

conference locations as “site visits” and attend the accompanying conference. Although our office does not agree that many of the conference expenses were necessary, one of our responsibilities is to identify these expenses so that all those involved may also make a determination as to whether the Commission acted in the best public interest. The following information will assist those in the decision making process.

The Commission conducts an annual conference in which industry members, Commission staff, and their families meet pertaining to matters and topics related to the tomato industry. Per discussion with Employee A during our first week of fieldwork, he explained that the annual conference is intended to be self-sufficient. However, over the past several years, the conferences have experienced large deficits that appear to discount this claim. Although we limited our audit testing to the financial activities of the 2004, 2005, and 2006 conferences, we noted large deficits in 2004 and 2005 that we compared to previous years to determine whether they were unusual. During our analysis, we identified similar deficits for the conferences held in 2001, 2002, and 2003. Based on the amounts reported in the Commission’s general ledger and internal Commission worksheets, from 2001 through 2006, the annual conference’s income totaled \$350,604, while disbursements totaled \$479,186, for a net deficit over the six-year period at <\$128,582>. Please refer to **Table 1** below for a detailed summary of the conference’s related activities over the past six years as recorded by the Commission in their general ledger.

Table 1

CALIFORNIA TOMATO COMMISSION							
SUMMARY SCHEDULE OF ANNUAL CONFERENCE RECEIPTS AND DISBURSEMENTS							
Twelve Months Ended February 28, 2006, 2005, 2004, 2003, 2002, 2001							
	2006	2005	2004	2003	2002	2001	GRAND TOTALS 2006-2001
RECEIPTS:							
Registration	\$37,958	\$21,850	\$44,730	\$33,421	\$32,872	\$23,164	\$193,994
Sponsorship	41,810	27,500	21,250	24,500	17,625	23,925	156,610
Total Receipts	79,768	49,350	65,980	57,921	50,497	47,089	350,604
DISBURSEMENTS:							
Entertainment	37,855	36,608	37,575	42,024	30,570	24,879	209,511
Education	4,296	-	-	729	21,234	15,527	41,786
Seminar/Meetings	7,700	15,864	17,438	25,596	17,980	19,731	104,309
Staff Expenses	21,106	17,816	18,224	18,859	6,842	4,877	87,724
Miscellaneous	7,395	4,851	16,055	1,534	3,204	2,817	35,856
Total Disbursements	78,352	75,139	89,292	88,742	79,830	67,831	479,186
SURPLUS/(DEFICIT)	\$1,416 A	\$<25,789>	\$<23,313>	\$<30,821>	\$<29,333>	\$<20,742>	<128,582>
LOCATION	Cabo San Lucas, Mexico	Huntington Beach, CA	Cabo San Lucas, Mexico	Tucson, Arizona	San Diego, CA	San Francisco, CA	
Note A: \$6,500 expense for the 2006 Conference was inappropriately charged to the 2005 Conference, therefore the 2006 conference also experienced a deficit. In addition, our office identified between \$5,000 and \$10,000 in conference related expenses for each of the 2004, 2005, and 2006 conferences that were recorded in other Commission expenditure accounts. Had these expenses been charged to the conference expense line item, the deficits would be larger.							

Although the intention of the Commission may have been to operate a self-sufficient conference, year after year conference deficits indicate that this was not a reality and that assessment dollars were used to cover the shortfall. The Commission primarily operates one bank account of which both conference income and assessment payer fees are collected and deposited. Since the conference income was not sufficient to pay for the related expenses incurred, it becomes evident that assessment payer fees were used to pay for these expenses.

Our office is aware that Commission business was conducted at these conferences; however our office does not consider many of the expenses to be in the best interest of the public for the obvious reasons as mentioned throughout this report. Not only were the destinations such as Cabo San Lucas, Mexico, and Arizona unnecessarily expensive, the following expenses were questionable and more importantly may be considered a gift of public funds:

- Prior to each of the 2004, 2005, and 2006 conferences, the Commission paid for airfare, meals, hotels, and activities of the spouses and children of Employees B and D, to accompany them in conducting “site visits” at potential conference locations. These site visits occurred several months prior to the start of the actual conference. For the three conferences “site visits” that we examined, the staff members and their family incurred approximately \$25,000 in expenses in traveling to and during visits, twice at Cabo San Lucas, Mexico, and once in Huntington Beach that were fully paid for by the Commission. In addition, the Commission paid for Employee A to stay two nights at the Lodge in Torrey Pines as a potential “site visit” for the 2004 conference. It should be noted that this location was not selected. Furthermore, Employee’s A gave us two different reasons why he went to Torrey Pines, once again raising our level of professional skepticism.
- During the “site visit” at Huntington Beach related to the 2005 conference, hotel folio’s show that Employee’s B and D charged approximately \$750 in spa treatments to their rooms. The commission paid these charges and was not reimbursed from the employees. It should be noted that Employee’s B and D did not retain their hotel folio’s for the 2004 and 2006 site visits. Therefore, we could not review the charges made by these employees during those years for appropriateness.
- During each of the 2004, 2005, and 2006 annual conferences, the Commission paid for the airline tickets, lodging, and meals of one guest of each Employee B, C and D to attend the annual conference. Furthermore, the commission paid for a few members of Employee A’s family to attend the annual conferences. The total amount directly spent on employees, their family members and guests to travel, lodge, dine and attend the three conferences exceeded \$43,000.
- Included in the amount above, the Commission spent \$5,314 to charter a private aircraft and transport staff members, a board member and his spouse from Fresno to the 2005 conference in Huntington Beach, CA.
- At the 2005 conference, the Commission spent \$653 to hire a H2 Hummer Stretch limousine to transport staff members and their families to and from the Hyatt Regency Hotel to Morton’s of Chicago’s for a pre-conference dinner. In addition, the Commission paid \$1,687 for the staff dinner.

- The Commission paid for four airline tickets for Employee A's daughter and her guests to fly from San Jose to Santa Ana and attend the 2005 conference. In addition, the Commission paid for a limousine to pick her and her guests up at the airport and transport them to the Conference hotel. The Commission also sent a limousine to transport three family members of Employee A and B from the Los Angeles international airport to the conference hotel prior to the start of the 2005 conference.
- Our audit was limited to the information provided by the Commission's employees. We noted that detailed folio's for all room charges incurred during the site visits and conferences were not retained by the employees and not available for our review.

Although, the Commission's own accounting of the conferences identified a deficit averaging <\$25,000> per year over the past six years, our office's analysis puts the deficit even higher as we identified expenses incurred directly at the conference that were recorded to other expenditure line items within the Commission's general ledger. For example, all expenses incurred by another employee of the Commission, Employee C and her friend (approximately \$3,000 per year) to attend each of the conferences in 2004, 2005, and 2006 were recorded to California Grown expenditure line item, rather than conference expense. For the 2005 conference, the \$5,314 incurred to charter a private aircraft for employees to attend the conference was recorded to Account #549-10, Commissioner-Travel, rather than conference expense, and the approximately \$2,100 paid to Best Limo for conference related travel was recorded to Account #548-10, Administrative Travel. Furthermore, the \$1,687 spent at Morton's of Chicago for staff members and their families was also charged to Account #548-10, Administrative Travel, rather than conference expense.

All told we determined between \$5,000 and \$10,000 in direct conference related expenses for each of the 2004, 2005, and 2006 conferences were charged to other Commission expenses line items. Had these charges been recorded or prorated into the conference expenditure line item, the overall deficits for the six-year period identified in **Table 1** would be much larger. Employee A's explanation for doing this was that the Conference represented three different business activities. He explained that at the 2005 Conference the Commission held its annual Board of Director's meeting, the Exchange held a meeting, and the Conference took place. Employee A stated,

"As to staff travel, there are the costs associated with attending the meeting. These would include, but not limited to, transportation from Fresno to the meeting site. These are expenses that would be incurred with or without the conference."

However, our office disagrees that costs associated for travel would have been incurred with or without the conference. The travel related to conducting a board meeting in Huntington Beach or Cabo San Lucas, Mexico is directly related to the location of the Conference rather than a board meeting that could have been held locally. Without these destinations, the Commission would not have incurred excessive travel expenses. Furthermore, although the Commission allowed the Exchange to conduct its meetings during each of the 2004, 2005, and 2006 conferences, the Commission did not allocate a sufficient percentage of conference expense to the Exchange. A review of the Commission's general ledger identified that no charges were allocated to the Exchange in 2004 and 2006. In 2005, less than \$1,200 in meeting expenses was allocated to the Exchange. This despite the fact that it appears Exchange business represented a

portion of the overall business activities conducted during the conference. This raises concerns about whether the Exchange owes the Commission monies for a portion of these expenses.

Even though the Commission's own accounting records identify deficits for the conferences from 2001 to 2005, the Commission continued to operate an inefficient conference year after year. To highlight this inefficiency, our office observed the agenda for the 2006 conference held in Cabo San Lucas, Mexico and noted that only about 1 ½ days were dedicated to business related sessions. The following information was gathered from an agenda that was provided to us for the 2006 conference:

Wednesday, February 8th

3:00 pm to 6:00 pm – Registration

6:00 pm to 8:00 pm – Opening Reception

Thursday, February 9th

7:30 am – Welcome Breakfast

9:30 am – Changing Trends in Foodservice Purchasing

11:15 am – Research Report: How Safe are our Tomatoes?

12:30 am – Address to the Industry Lunch

1:30 pm – Quality Task Force – Members and Invited Guests

1:30 pm – Breeder Roundtable

Friday, February 10th

Day at Play

Saturday, February 11th

9:00 am – State of the Industry Reports

10:30 am – California Fresh Tomato Growers Exchange

6:00 pm – Closing Party Reception

6:30 pm – Closing Party Fiesta

The above agenda calls into question the rationale, value, and business purpose of annually spending between \$69,000 and \$90,000 to hold a conference that had incurred repeated deficits in distant locations for basically a day and one half of business related activities.

Finally, the Commission did not provide clear transparency or disclosure of all conference related activity to all assessment payers or the CDFA. In accounting for the annual conference within the annual financial statements and annual budgets, the Commission netted conference revenues against expenses rather than report both amounts at gross. Our office requested an explanation from the Commission's Certified Public Accountant and among other things he stated,

“The primary users of the financial statements are the board of directors. If they so desire, they can distribute them to growers and handlers. All of them are aware of the conference, or should be. The conference is discussed at board meetings; many of them attend the conference; and if they want detail of the conference receipts and disbursements, they have access to Quickbooks reports. Everything is transparent.”

Our office disagrees with this statement. Our office believes the assessment payers and the CDFA are as much primary users of those financial statements as anyone else. Furthermore, our office could not find any record of discussion in the board minutes that fully explained the costs involved in these conferences. In addition, no amounts were reported in the annual budgets submitted to CDFA for concurrence. For example, in FY 2005/06 the operating budget submitted to the CDFA lists its conference revenue at \$0 and its conference expenses at \$0. Therefore, in reviewing the annual audited financial statements or the annual budgets, there was no way for any individual outside of Commission management and board members to understand the nature, extent, and volume of resources spent on the annual conference. It should be noted the Food and Agriculture Code 78668 states that a summary of the audit shall be reported to all persons subject to this chapter, a copy of which shall also be submitted to the department.

Recommendations

3. *The Commission should review all prior year conference related expenses and determine the total amount spent on the family members and guests of employees and the personal amounts spent by employees. The Commission should establish an accounts receivable and seek reimbursement of these expenses since these appear to be gift of public funds.*
4. *The Commission should ensure all conference related income and expenses are fully disclosed at gross in the annual budgets submitted to CDFA for concurrence and the financial statements sent to all assessment payers.*
5. *The Commission should operate their business activities in the best public interest.*

CREDIT CARD CHARGES

Our Office noted that the Commission did not keep adequate documentation on file for credit card charges, such as actual invoices, receipts, and hotel folio's, on numerous occasions for the charges incurred by employees. A review of the Commission's general ledger identified that a majority of the discretionary expenses made by commission employees were purchased using their Commission's American Express credit cards. For the period March 2003 through August 2006, each of the four employees had a separate American Express Card. Each month, American Express sent one statement summarizing the activity of all four employees. All incurred charges were itemized under each employee's name and one payment was made by the Commission for all the charges incurred by all four employees. The total net charges generated by the respective credit card holders were approximately \$653,000 during this time period.

Our Office was not provided the requested supporting documentation and Employee A informed us that it was not policy to retain invoice copies since the charges and credits were listed on the credit card statements. Our office determined that a review of the credit card statements did not meet the criteria for supporting documentation since the absence of original invoices, business purpose notations, attendees, account classifications, and justification of the benefit to the Commission was not evident.

Some of the credit card charges we initially observed were as follows:

- Restaurant and hotel charges totaling thousands of dollars without an accompanying receipt/invoice.

- Airline passengers identified as Commission family members and or friends traveling to the annual conference.
- Personal charges that were recorded as employee receivables.

Our office requested that the employees provide us with receipts/invoices as well as written explanations to all of the charges. Eventually, by working through the Commission liaison, the employees made efforts to obtain the related receipts, hotel folio's, and trip agendas for all charges for the forty-two month audit period. We reviewed the initial attempt on November 3, 2006 and determined that while it was helpful in supporting a portion of the credit card charges, numerous large amounts remained unsupported. Due to the enormous amount of charges, and realizing the anticipated hardship that the burden of securing old receipts would place on Commission employees, we provided a sample of eight pages summarizing material charges that the four employees needed to gather actual receipts for. The four employees sent us additional support on November 14, 2006. However, our review indicated that a majority of the charges were still not supported by original receipts. Instead the employees provided us written explanations, letters sent to vendors requesting duplicate receipts that the vendors responded by saying that a receipt/invoice could not be provided and other attempts to justify the expenses they had incurred. However, without the proper support, we are still unable to determine whether numerous charges for meals and lodging were reasonable.

Based on the limitations noted above, below is a summary of our concerns of credit card charges incurred by each of the Commission's four employees.

Employee A's Credit Card Charges

For the audit period, Employee A incurred approximately \$320,000 in credit card charges.

Of this amount, Employee A charged \$4,856 on airline tickets for family members and/or their guests, to attend the 2004, 2005, and 2006 annual tomato conferences that was previously mentioned in the report. Furthermore, all other accompanying expenses incurred by these family members and guests on lodging, meals and other activities during the conferences were also paid for by the Commission. We cannot determine the exact amounts spent on these family members due to the lack of actual receipts. Furthermore, we requested the Commission to determine the amounts spent on entertainment for employee's family and/or guests at the conferences; however they have not done so thus far.

Employee A also incurred approximately \$32,000 in meal expenses during this time period as well. Since we were rarely provided receipts for these amounts, we are listing a few of the restaurant charges we observed on the credit card statement:

- \$5,709 for four 2006 restaurant charges that Employee A describes as MAP events with complete documentation maintained at BCI, no receipts could be provided. Employee A stated "this was a MAP event, and the documentation for these activities would be held by Individual #28 in Seattle, as these expenses are subject to a USDA audit". Since the Commission initially pays for these expenses, the supporting documentation or related copies should be maintained at the Commission offices.
- \$1,687 charge at Morton's restaurant described as pre-conference staff and spouses dinner.

- \$2,105 was spent at Caesars Italian Restaurant described as the annual Board of Directors dinner.
- \$1,779 was spent at Rio City Café for reverse trade mission as explained by Employee A.

The receipt becomes very important in determining whether the meals and/or alcohol paid with Commission funds is reasonable. On one of the rare occasions that we received a receipt for a restaurant charge for a dinner in Sacramento, California, in September 2006, we were able to determine that three \$190 bottles of wine were charged to the credit card.

Employee D's Credit Card Charges

For the audit period, Employee D incurred approximately \$160,000 in credit card charges of which the following concerns are noted:

- Employee D charged \$7,156 on airline tickets for her family members and family members of Employee B, to attend "site visits" prior to and to attend the 2004, 2005, and 2006 annual tomato conferences that were previously mentioned in the report. Furthermore, all other accompanying expenses incurred by these family members on lodging, meals and other activities during the conferences and site visits were also paid for by the Commission. We cannot determine the exact amounts spent on these family members due to the lack of actual receipts.
- No invoices could be provided for \$19,445 spent at the Hyatt hotels for annual research meetings held January 2005 and 2006.

Employee C's Credit Card Charges

For the audit period, Employee C incurred approximately \$126,700 in credit card charges of which the following concerns are noted:

- Employee C charged \$1,136 on airline tickets for guests to attend the 2004, 2005, and 2006 conferences that were previously mentioned in the report. Furthermore, all other accompanying expenses incurred by the friends on lodging, meals and other activities during the conferences were also paid for by the Commission. We cannot determine the exact amounts spent on these guests due to the lack of actual receipts.
- Employee C spent more than \$10,000 on meals during the audit period. We noted that a majority of the actual receipts were not maintained for our office to understand the charges incurred. For example, we noted the employee incurred a charge of \$1,967 at an Italian Restaurant after the annual Board of Directors meeting in San Francisco. A receipt could not be provided for us to determine the reasonableness of this expenditure.

Employee B's Credit Card Charges

For the audit period, Employee B incurred approximately \$46,400 in credit card charges of which the following concerns are noted:

- Employee B charged \$1,969 on airline tickets for family members, to attend site visits prior to and to attend the 2004, 2005, and 2006 conferences that were previously

mentioned in the report. Furthermore, all other accompanying expenses incurred by these family members on lodging, meals and other activities during the conferences were also paid for by the Commission. We cannot determine the exact amounts spent on these family members due to the lack of actual receipts.

These charges for all employees raise concerns as to the benefits derived by the Commission, whether these expenses are ordinary and necessary, the lack of proper controls, and the validity of the representations in the audited financial statements regarding related entities and actual costs for the annual conference.

Recommendation

- 6. The Commission should keep adequate support for all expenses incurred. At the very least the Commission should ensure that a receipt/invoice is kept on file along with the names/business conducted if appropriate.*
- 7. The Commission should determine the personal amounts spent with Commission funds and seek reimbursement from the appropriate employees. These personal amounts appear to be a gift of public funds.*

USE OF PRIVATE AIRCRAFT CHARTERS

Our office noted that over the past three years the Commission made 13 payments totaling \$44,817 to different private aircraft charter companies for travel related expenses. The Commission's explanation for utilizing private aircraft charter services rather than flying with a commercial airline was that it was more cost effective. However, we disagree with this statement and feel that with sufficient planning, a less costly travel alternative was available. For example, the Commission paid \$5,314 to transport two staff members, a Board member, and their guests from Fresno to Santa Ana and return in order to attend the 2005 tomato conference. A few months earlier, Employees B & D each charged less than \$100 to their Commission credit cards for gas in traveling from Fresno to Santa Ana and return during their conference "site visit". Furthermore, staff members routinely fly from Fresno to Los Angeles at a cost of less than \$200 per trip.

Our office also noted that the Commission did not perform a cost-benefit analysis to justify any of the 13 trips prior to the trip's commencement. Refer to **Table 2** below for a summary of the Commission's use of private aircraft charter companies.

Table 2

CALIFORNIA TOMATO COMMISSION SUMMARY OF PRIVATE AIRCRAFT CHARTER EXPENSES For Years 2006, 2005, 2004, & 2003						
Item Number	Invoice Date	Company	Passengers	Destination	Business Purpose	Total Cost
1	5/13/03	Andrew & Williamson	Individuals #8, #9, #10, and #11	Montgomery to Brownfield to Fresno to Watsonville to Carlsbad	Board Meeting	\$ 2,796
2	8/6/03	Andrew & Williamson	Individuals #8 and #11	Palomar to Brownfield to Fresno to Carlsbad	Board Meeting (not verified)	\$ 2,910
3	5/12/04	Express Air Charter	Individuals #10, #12, #13, #14, and #15	Carlsbad to Stockton to Carlsbad	Board Meeting	\$ 3,659
4	6/29/04	Air Fred	Information not provided	Information not provided	Canada 2004 MAP	\$ 3,657
5	7/30/04	Sky Trek	Employee A, Employee C, Individuals #16, #17, #18, and #19	Modesto to Fresno to Santa Ana to Fresno to Modesto	Filming DVD Good Ag Practices	\$ 4,528
6	8/19/04	Air Fred	Employee A, Individuals #16, #37, and #38	Fresno to Santa Ana to Fresno	Filming DVD Good Ag Practices	\$ 3,135
7	2/28/05	Air Fred	Employees C, D, Board Member E, Individuals #20 and #21	Fresno to Santa Ana to Fresno	2005 Conference	\$ 5,314
8	6/10/05	Great Circle Aviation	Individuals #12 and #14, Board Member H	Carlsbad to Santa Barbara to Fresno	Board Meeting	\$ 1,200
9	6/16/05	Andrew & Williamson	Individuals #6, #35, #36	Information not provided	Baja Meeting	\$ 3,529
10	12/14/05	Wofford Aviation	Employee A, Individuals #2 and #23	Fresno to San Diego to Fresno	Court Appearance	\$ 2,667
11	2/21/06	Wofford Aviation	Employee A	Fresno to Bermuda Dunes to Santa Anna to Fresno	Nomination Meetings	\$ 2,934
12	7/19/06	Wofford Aviation	Individuals #7, #24, #25, #26, #27, #28, #29, #30, #31, and #32	Oxnard to Fresno	Guadalajara Trade	\$ 5,515
13	8/16/06	Wofford Aviation	Information not provided	Information not provided	Canada 2006 MAP	\$ 2,973
Grand Totals						\$ 44,817

Recommendation

8. *Prior to contracting for the use of a private aircraft for travel related purposes, the Commission should perform a detailed cost-savings analysis that documents and demonstrates the necessity and benefit expected in using assessment dollars to charter a private aircraft. The analysis should clearly identify the savings expected to occur in chartering a private aircraft versus other travel options.*

EMPLOYEE RECEIVABLES

Commission employees appear to have violated the Commission's Internal Policy Manual dated August 2004. The manual states that employees were not to charge personal expenses as a matter of convenience. However, our office noted that the Commission had established employee receivables for thousands of dollars during our audit period. Employee A explained that the receivables were established due to personal expenses that the employees had charged to Commission credit cards. Therefore, we requested the Commission to provide us with the general ledger detail that would indicate the time period that the Commission carried the employee receivables and the detail of the employees' repayments. The Commission was able to provide us with general ledger detail as far back as September 1999. From these records, we observed the following:

- Employee A made personal charges on his Commission credit card in the amount of \$27,000. His personal charges that were shown on the Commission's general ledger detail included purchases made to various businesses including JC Penneys, Nordstroms, Louis Vuitton, ticketmaster, itunes, the Fairmont, and many other stores, restaurants, hotels, and businesses.

Since 1999, Employee A's personal charges carried balances in the thousands of dollars on a monthly basis and were as high as \$10,676. In many instances, his repayments to the Commission consisted of partial payments that were infrequent and nominal. From March 1, 2004 to February 14, 2005, Employee A made no repayments to the Commission while incurring approximately \$8,000 in personal charges on the Commission's credit card. Although his subsequent payment was made on February 18, 2005 in the amount of \$5,383, the credit card monthly balance had already reached \$10,676.

- Employee E has not been employed by the Commission since 2001. During November 1999 through May 2001, she made purchases with her Commission credit card totaling approximately \$11,000. Similar to Employee A, her payments were infrequent and nominal at times. At one point, her Commission credit card had a balance as high as \$9,500.
- Employee D incurred less than \$218 in personal charges with her Commission credit card that was recorded as an employee receivable.

These personal charges were not further explored by our office since the Commission established an Accounts Receivable for each of the employees which were eventually paid off by them.

Recommendations

9. *The Commission should not allow its staff to use Commission credit cards for any personal use.*
10. *The Commission should strengthen its internal controls over the use, review and approval of all Commission credit cards.*

SPONSORSHIPS

Our office became aware of another possible conflict of interest during the course of our audit.

Since March 2003, the Commission wrote five checks to Individual #1 totaling \$45,000. According to documentation provided to our office, the \$45,000 was paid to Individual #1 for advertising displayed on his truck while racing for Company C. Individual #1 raced his truck in San Felipe, Mexico and Ensenada-Baja California, Mexico during 2005 and 2006 with the California Tomato Commission logo clearly visible on the sides of his truck. In an attempt to better understand Company C, our office observed a couple of articles on the internet. In one of the articles, our office noted that Individual #1 had a co-driver named Board Member A. Since the Commission also had a board member named Board Member A, our office inquired with Commission personnel to determine whether this was the same person. Our office was informed that Board Member A, board member of the Commission, was also the co-driver for Individual #1.

Since these payments raise concerns regarding a conflict of interest, as well as our understanding that these amounts were reimbursed by the federal government, our office will be forwarding this information and our final report will be issued to the federal government for their interpretation of the appropriateness of these payments. Although the Commission has assured us that the federal funds have been audited by the federal government, that audit does not assure our office that the federal government is aware of that particular situation.

Recommendation

11. *The Commission should contact the federal government to determine the appropriateness of this use of federal funds, specifically as it relates to Board Member A and Company C.*

TOTAL SALARY PAID TO EMPLOYEE A

Our Office could not independently verify whether the total salary paid to Employee A for the years 2003 through 2006 was sufficiently authorized or appropriate due to the lack of internal controls over the record keeping of the Commission's executive committee board meeting minutes (executive committee minutes). Refer to **Table 3** below for a schedule of the total salary paid to Employee A from 2003 through 2006.

During the first day of our audit, our office requested all official executive committee minutes for the audit period. We were provided a series of executive committee minutes that contained no signatures or dates by either a Commission Officer or Employee A. These included the minutes that authorized bonuses and raises in Employee A's salary. Our office brought this internal control weakness to Employee A's attention who indicated that signed and dated minutes existed; however, they were either in another location or at the Commission's attorney's

office. On October 30, 2006, the Commission's attorneys provided us with eleven sets of "official" executive session minutes from 2002 through 2006. These minutes were identified as the original source documents of the Commission. After reviewing these minutes, our office noticed the following weakness:

1. There were two sets of "official" February 23, 2002 executive committee minutes that each reflected a different version of Employee A's signature and date.
2. None of the eleven executive session minutes, including the ones that authorized salary increases and bonuses to Employee A were signed or dated by any of the three Commission Officers.
3. Two of the eleven sets of minutes did not contain any signatures and dates.

These weaknesses raise our office's level of professional skepticism and lessen the reliance we can place on the minutes provided to us on October 30, 2006.

Table 3

California Tomato Commission Schedule of Total Salary paid by the Commission to Employee A For the 2006, 2005, 2004, and 2003 years					
Year	Gross Salary	Bonuses	Payment for Unused Vacation	Auto Allowances	Total Salary
2006	\$112,000 (b)	\$ 25,000 (a)	\$ 4,417 (a)	\$ 7,200 (b)	\$ 148,617
2005	\$106,000	\$ 25,000	\$ 6,625	\$ 7,200	\$ 144, 825
2004	\$106,000	\$ 15,000	\$ 0	\$ 7,200	\$ 128,200
2003	\$100,000	\$ 15,000	\$ 8,333	\$ 7,200	\$ 130,533
<i>Note: The Total Salary does not include the salary paid to Employee A to manage the Exchange or other entities.</i>					
<i>(a) Paid to Employee A in January 2006</i>					
<i>(b) Amounts projected through December 31, 2006</i>					

It should also be noted that for the period March 2003 through September 2006, Employee A charged approximately \$96,000 for airfare, incurred more than \$32,000 in meal expenses for him, board members, and related business associates, and charged approximately \$47,000 in lodging expenses to his Commission credit card.

Recommendations

12. *The Commission should verify that the total salary paid to Employee A from 2003 through 2006 is appropriate.*
13. *The Commission should ensure all executive committee minutes are signed and dated by one of the three Board Elected Officer's along with the President of the Commission.*
14. *The Commission should ensure that all official accounting records, including certified copies of Board Minutes are centrally located and easily accessible to the public.*

PAYMENT OF UNSUPPORTED ACCRUED VACATION HOURS

Our office could not independently verify whether the payments received by Employee's A, B, C and D for cashing in their vacation time were appropriate or accurate. Although the Commission is responsible for keeping accurate books, records, and accounts of all its business transactions in accordance with the Food and Agriculture Code, the Commission did not formally record, track, or account for the earning and use of employee vacation time. During our audit, we noted that over the past several years that, in addition to salary and bonuses, Employee A was paid a total of \$19,375 for vacation time he indicated that he had accrued but not used. In addition, we noted that Employee's B, C, and D were paid \$1,138, \$8,750, and \$916 for vacation time they indicated that they had earned but not used. However, without the proper accounting or timekeeping records detailing the accrual and subsequent use of vacation hours, we could not review or verify whether the payments received by the employees were appropriate or accurate.

In addition, these payouts appear to violate the Commission's own operating policy. At the beginning of our audit, we requested the Commission to provide us with any and all policy manuals regarding their operations. The Commission complied with this request by giving our office an Employee Handbook dated March 1, 2000. Our office also received a copy of the Commission's Internal Policy Manual dated August 2004.

The Commission's August 2004 Internal Policy Manual did not address employee compensation. However, the March 1, 2000 Employee Handbook stated the following regarding the payout of employee vacation time,

"No employee will receive pay in lieu of vacation except on the termination of his or her employment..."

Our office brought this internal policy violation to the attention of the Employee A. A few days after providing the Commission with our finding, Employee A provided us with a different Employee Handbook. The 2nd handbook was identical to the March 1, 2000 Employee Handbook that we originally received, except for changes in two sentences within the 47 page handbook. The first difference was the part of the Employee Handbook that dealt with vacation payouts. The 2nd handbook stated,

"An employee may pay in lieu of vacation upon approval of the President."

The other difference was the new handbook did not have a date on the front cover page. Our office could not identify any other differences between the March 1, 2000 Employee Handbook and the 2nd Handbook. Since the two manuals were nearly identical except for the fact that our audit finding was clearly addressed in the 2nd handbook, our office requested additional

information as it related to the origin and issuance of the 2nd handbook. Our office requested information as to when the 2nd handbook was given to employees. However, both Employee B and C indicated that they could not remember the issuance of the 2nd Employee Handbook. No other information was provided to our Office regarding the origin or issuance of the 2nd Employee Handbook.

Our office did note that within each employee's personnel files was a signed and dated one page "Acknowledgement of Receipt of Handbook" for the March 1, 2000 Employee Handbook. This document is page 47 of the March 1, 2000 Employee Handbook and was torn out and placed within each employee's personal file upon their receipt of the handbook.

The "Acknowledgment of Receipt of Handbook" states,

"I understand and agree that the terms of this Acknowledgement may not be modified or superseded except by a written agreement signed by me and the Chairman of the Commission, that no other employee or representative of the Commission has the authority to enter into any such agreement, and that any agreement to employ me for any specified period of time or that is otherwise inconsistent with the terms of this Acknowledgement will be unenforceable unless in writing and signed by me and the Chairperson of the Commission."

No such signed and dated "Acknowledgment of Receipt of Handbook" existed or was provided to our office for any Commission employee pertaining to the 2nd handbook. In addition, subsequent to the 1st handbook we received, our office was provided a two-page unsigned and undated document titled employee compensation policy. The document specified that employees could cash their unused vacation time. However, the fact that this document was (i) provided to us after we notified the Commission of the their policy violation, (ii) contradicts the March 1, 2000 Employee Handbook that each employee certified as receiving and adhering to, and (iii) contained no signatures or dates, lessened any reliance our office could place on it.

Recommendation

- 15. The Commission should establish an accounts receivable and collect reimbursement for all amounts paid to the four employees for unsupported and unaccountable vacation time cashed on their behalf.*

VIOLATION OF OPEN MEETING LAWS

On September 18, 2006, our office noted that Employee A, C, and several board members, including Board Member J's wife, had dinner at a restaurant in Sacramento, California. A total of \$1,511 was charged to the Commission's credit card, which included the purchase of three bottles of wine costing \$190/each for a total of \$570. Our office requested an explanation for this charge and was provided with the following written explanation by Employee A.

"The business discussion was that related to the restructure of the Commission, including, but not limited to the future of the research efforts, the progress to date on marketing activities both domestic and international, and the relationship with CDFA.

As to the expenditure for wine, decisions related to the menu selection and that of wine are those of the directors, not staff, which is the case at all meal functions attended by

Board members. While staff offered to pay for the wine, in appreciation for the Board's long-time support of staff, this offer was rejected by the board members."

Based on the above, the business discussions and lack of notification to the public, the dinner discussions appear to violate open meeting laws. Our office requested information from the Commission regarding any further interpretation of the meeting and none was received.

It should be noted that the Bagley-Keene Act is yet another avenue for the public to monitor and participate in the decision-making process.

Recommendation

- 16. The Commission should seek further guidance from the proper authorities on handling a violation of an open meeting law. The Commission should disclose all business meetings to the public in accordance with the appropriate open meeting laws.*

VIOLATION OF THE PUBLIC CONTRACTS CODE

Our office identified several instances in which payments were made to independent contractors that (i) did not demonstrate any competitive bidding effort, (ii) were not supported by any type of contract, and (iii) may have exceeded contract amounts without sufficient amendments. Our scope was limited to these three areas and we did not attempt to determine if the contracts were fulfilled. Our office requested information regarding several payments to independent contractors to determine whether the Commission was in compliance with the Public Contracts Code (PCC) as it related to bidding.

Although our office limited our testing, we became aware that the Commission was not following the Public Contracts Code. Therefore, our office requested the Commission's policy as it relates to bidding. The Commission responded by stating,

"In most cases, in an on-going relationship, where performance has met all expectations, is worth retaining, as compared to going to bid."

Based on the evidence collected and the statement of the Commission, the Commission did not adhere to the Public Contracts Code as it relates to bidding. Our office did not conduct an audit of the performance of these contracts based on the amount of time it was taking our office to receive the credit card detail.

Based on our review of Commission payments to independent contractors over the amount of \$100,000, our office noted the following items:

- During 2003, 2004, 2005 and 2006, the Commission made payments to Individual #7 totaling \$374,925. Individual #7 was contracted with to review current tomato handling practices, to provide training seminars, to provide advisory marketing services, and to be a liaison for tomato growers. Based on the four contracts our office received for Individual #7 totaling \$58,500 through August 2006, it appears that Individual #7 may have been paid more than the stated maximum on the contracts by \$316,425. This would depend on whether this amount represents reimbursable expenses that are supported with actual receipts not reviewed by our office. In addition, no evidence was provided that the Commission demonstrated a competitive bidding effort in securing Individual #7's services. Overpayment to this contractor was also addressed during a federal audit.

- During 2003, 2004, 2005 and 2006, the Commission made payments to Company F totaling \$267,696 for services relating to researching specific issues affecting the export of California tomatoes to Mexico and to assist in administrating the United States Department of Agriculture (USDA) Unified Export Strategy. Based on the two contracts our office received for Company F totaling \$71,400, it appears that Company F may have been paid more than the stated maximum on the contracts by \$196,296. This would depend on whether this amount represents reimbursable expenses that are supported with actual receipts not reviewed by our office. In addition, no evidence was provided that the Commission demonstrated a competitive bidding effort.
- During 2004, 2005 and 2006, the Commission made payments to Company A totaling \$225,856 for legal services. Our office was never provided a contract for these payments and no evidence was provided that the Commission demonstrated a competitive bidding effort.
- During 2003, 2004, 2005 and 2006, the Commission made payments to Company G totaling \$156,354 for services relating to research coordination. Based on the one contract our office received for Company G totaling \$47,000, it appears that Company G may have been paid more than the stated maximum on the contract by \$109,354. This would depend on whether this amount represents reimbursable expenses that are supported with actual receipts not reviewed by our office. In addition, no evidence was provided that the Commission demonstrated a competitive bidding effort.
- During 2003, 2004, 2005 and 2006, the Commission made payments to Company H totaling \$154,665 for services relating to various services. Our office was never provided a contract for these payments and no evidence was provided that the Commission demonstrated a competitive bidding effort.
- During 2003, 2004, 2005 and 2006, the Commission made payments to Company I totaling \$167,348 for general marketing services. Based on the one contract our office received for Company I totaling \$42,000, it appears that Company I may have been paid more than the stated maximum on the contract by \$125,348. This would depend on whether this amount represents reimbursable expenses that are supported with actual receipts not reviewed by our office. In addition, no evidence was provided that the Commission demonstrated a competitive bidding effort.

Recommendation

- 17. The Commission should seek guidance from the proper authorities as it relates to their violation(s) of the Public Contracts Code.*

PUBLIC RECORDS ACT

Our office conducted a brief analysis of the Public Records Act (PRA) requests that were received and processed by the Commission.

Based on our analysis, Individual #33 requested information from the Commission on July 12, 2005. Company A responded to Individual #33 on July 22, 2005, stating that a 14 day extension was being invoked. The next letter from Company A to Individual #33 was on November 17, 2005. However, the letter states in part,

“It is estimated that the Commission will make copies of its disclosable records available to you on or before August 31, 2005.”

Since the date on the letter was November 17, 2005 and the contents of the letter reference a date that had already passed, our office requested a possible explanation for this from the Commission. The Commission contends that correspondence was made with Individual #33 in October 2005. Either way, it appears that Individual #33 was not contacted by the Commission within the required time period. Therefore, it appears the Commission was in violation of the PRA.

Recommendation

18. The Commission should adhere to the rules of the Public Records Act. In order to accomplish this, the Commission should have all records readily available to the public.

AUTO ALLOWANCES

The Commission has been paying up to a \$600 monthly auto allowance to Employee A and C for the audit period March 2003 through September 2006. Furthermore, our audit disclosed that Employee A was paid thirteen \$600 monthly auto allowances for both fiscal years ended February 2004 and 2005. Employee A has not responded as to when the overpayment(s) will be refunded to the Commission.

In addition, Employee A and C have not provided documentation showing they provided accountability with the locations (where the expenses were incurred, between what points, how many miles) to the Commission supporting the Commission business mileage driven. The absence of this information may require the Commission to report these auto allowances as taxable income to both employees

Documentation received by our office on November 16, 2006 states,

“The Commission provides car allowances in lieu of salary for some management class employees.”

However, a review of Employee A and C’s W-2’s did not appear to disclose the auto allowances as taxable income. Since Employee A has received income from the Commission, the Exchange, and his consulting firm, without travel logs he cannot adequately document that all mileage is the result of his employment with the Commission. Furthermore, the Commission may have exposed themselves to additional payroll taxes, penalties, and interest by not correctly reporting these payments as taxable income on Employee A and C’s annual W-2’s.

Recommendations

19. The Commission should contact the proper taxing authorities to ensure the Commission properly tracked and reported its employee’s car allowances. Furthermore, the Commission should require that employees submit monthly travel logs that indicate the business mileage driven and/or the actual maintenance incurred.

20. The Commission should collect any overpayments paid to Employee A.

COMMISSION RECORDS

The Commission did not keep accurate books, records, and accounts of all its business transactions as required by Food and Agriculture Code. During the first week it became evident that Employee A did not retain all of the records at the Commission's office in Fresno, California. This was evidenced by conversations with him, as well as, his inability to produce adequate documentation for many of the Commission's expenses. Employee A also informed us that all of the Market Access Program (MAP) information was kept in Seattle, Washington. This non-compliance with the Food and Agriculture Code resulted in multiple delays in our audit and has been an inefficient use of the Commission's personnel during the audit as evidenced below.

Although our audit commenced on September 11, 2006 at the Commission's office in Fresno, California and ended on November 3, 2006, we encountered numerous delays during our audit. At one point our office left the Commission for a four week period because the Commission could not provide adequate support for its business transactions. To further complicate matters, Employee A was recused from the audit after the first week of fieldwork. The Commission's legal counsel then became the liaison for which our office continued to work with, specifically Individual #2 of Company A.

On November 3, 2006, our office notified Individual #2 that we would not be returning to the Commission. After almost two months of waiting for adequate support, the Commission did not provide the documentation requested by our office.

It should be noted that the Commission informed us that their credit card statements provided adequate documentation for those charges and was also accepted by its CPA as adequate support for credit card charges. However, a credit card statement does not provide adequate documentation. For example, a credit card statement does not provide a list of attendees for a restaurant charge, the business discussed, and benefits to the Commission which is absolutely relevant in determining whether the credit card charge is of a personal use or a business use. These credit card charges are discussed in the report.

The Commission mailed us additional information up until Thursday November 16, 2006. At this time our office has not accepted any additional information from the Commission.

Recommendation

- 21. The Commission should keep adequate support for all expenses incurred. At the very least the Commission should ensure that a receipt/invoice is kept on file along with the names/business conducted, if appropriate.*

PREGNANCY LEAVE POLICY

Employee A authorized payment of compensation for Employee D while she has and continues to be on disability leave for pregnancy since approximately August 2006. Her biweekly compensation is offset by pregnancy-related disability payments. Both versions of the Employee Handbook (one version undated, one version dated March 1, 2000) under Pregnancy-Related Disability Leave or Transfer states,

"Except as provided by law or in this Handbook, pregnancy leaves shall be unpaid."

As of November 16, 2006, our office has still not been provided with documentation that would allow for these payments.

Recommendation

- 22. The Commission should contact the proper authorities responsible for determining whether the amounts paid to Employee D are appropriate. This will ensure that the Commission is not providing Employee D with a gift of public funds.*

APPENDIX A

MEMORANDUM OF UNDERSTANDING BETWEEN
CALIFORNIA FRESH TOMATO GROWERS EXCHANGE AND CALIFORNIA TOMATO
COMMISSION

Effective April 1, 1997
Amended July 17, 2001
Amended April 27, 2005
Amended with Exhibit A, May 31, 2005

This Memorandum of Understanding is effective on the 1st day of April, 1997 by and between the California Tomato Commission, a California statutory corporation existing within the State Government, (hereinafter referred to as "COMMISSION") and the California Fresh Tomato Growers Exchange, a California cooperative marketing association under the provisions of Division 20, Chapter 1 of the California Food and Agriculture Code, relating to Agricultural Marketing Associations (hereinafter referred to as "EXCHANGE")

RECITALS

WHEREAS, COMMISSION and EXCHANGE, as separate legal entities, carry on various activities throughout the year in accordance with the laws, regulations and bylaws governing each.

WHEREAS, COMMISSION was created by the California Legislature (Cal. Food and Agric. Code SS78601 et. Seq) and implemented by an industry referendum for the purpose of assuming the administration of the program or promotion, research and other activities on behalf of the fresh tomato industry.

WHEREAS, the EXCHANGE is a voluntary association for those engaged in the production of a fresh tomatoes, formed for the purpose of engaging in any cooperative activity in conjunction with the production of, marketing or selling of fresh tomatoes for its members.

WHEREAS, COMMISSION agrees to allow EXCHANGE the use of CERTAIN office space and facilities at 1625 East Shaw Avenue, Suite 106, Fresno, California. In turn, EXCHANGE will compensate COMMISSION for the use of said premises and facilities at a rate to be agreed upon.

NOW, THEREFORE, in consideration of the mutual covenants set forth herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto agree as follows:

1. Responsibilities. The COMMISSION shall provide the EXCHANGE with storage space, access to a copier and postage meter, and related office supplies. The COMMISSION shall invoice and the EXCHANGE shall pay the COMMISSION for out-of-pocket or other expenses advanced by the COMMISSION over and above that for space and the use of office equipment. The EXCHANGE shall in no way be responsible for the creation of policy on behalf of the COMMISSION, nor shall the COMMISSION in any way be responsible for the creation of policy on behalf of the EXCHANGE.
2. Confidentiality. EXCHANGE and COMMISSION both agree to keep all records, transactions, communications, and correspondence separate and proprietary. All EXCHANGE records shall be maintained and stored apart from COMMISSION

materials. COMMISSION staff shall not have access to EXCHANGE information, except for a COMMISSION staff member who has signed a Confidentiality and Invention Assignment Agreement with COMMISSION.

3. Indemnification EXCHANGE agrees to indemnify, defend, and hold COMMISSION and Commission's officers, directors, agents, employees and representatives harmless from claims, losses, or damages arising from the action or omissions of EXCHANGE or EXCHANGE's officers, directors, members, employees or agents. COMMISSION agrees to indemnify, defend and hold EXCHANGE and EXCHANGE's officers, directors, members, agents, employees and representatives harmless from claims, losses, or damages arising from the acts or omissions of COMMISSION or COMMISSION's officers, directors, agents, employees, or representatives. EXCHANGE shall maintain, at its sole expense, the appropriate insurance coverage for the purpose of defending and indemnifying COMMISSION and its officers and its officers, directors, agents, employees, and representatives from liability that may arise from the acts or omissions of the EXCHANGE or EXCHANGE's officers, directors, members, agents, employees or representatives.
4. Term The term of this Memorandum of Understanding shall commence on April 1, 1997 and shall continue until terminated by either party, with or without cause, upon 30 days prior written notice.
5. Notice All notices and other communications hereunder shall be deemed to have been given when delivered personally, at the time confirmed for delivery if by telegram or facsimile, or if mail, at the time deposited in United States mail, postage prepaid and addressed as follows:

California Fresh Tomato Growers Exchange
7410 N Recreation Avenue
Fresno, California 93720

California Tomato Commission
1625 E. Shaw Avenue Ste 106
Fresno, California 93710

The parties may change their address as set forth in this paragraph by providing the other party with written notice thereof.

5. Amendments No change, amendment or modification of this Memorandum of Understanding shall be valid unless the same be in writing and signed by the parties hereto.
6. Applicable Law This Memorandum of Understanding shall be construed and governed pursuant to the laws of the State of California.

IN WITNESS WHEREOF, the parties have executed this Memorandum of Understanding effective on the day and in the year set forth above.

Exhibits: Supplemental Memorandum of Understanding, Dated May 31, 2005



May 31, 2005

The following represents a supplemental memorandum of understanding between the California Fresh Tomato Growers Exchange and the California Tomato Commission related to the enforcement of the California Code as it applies to Standardization and the regulation of the fresh tomato industry.

In response to the on-going gunnysacking problem, the Exchange will deposit with the California Tomato Commission prior to June 15, 2005, the amount of \$160,000.00; these funds will be held segregated from other funding received by the Commission, and shall be used to support county and state surveillance of fresh and processing tomato fields, flea markets, terminal markets, and other venues where illegal harvesting or marketing of fresh tomatoes may take place.

The Commission shall establish the infrastructure and contract with the appropriate state and county agencies to ensure that the enforcement is done in an efficient and cost effective manner.

The Commission is to provide a financial accounting of funds spent on surveillance and shall refund any unspent funding if so requested by the Exchange; the Commission shall invoice the Exchange for any services over and above the amount represented by this agreement.

The Exchange requests that the Commission forward a monthly summary of surveillance activity, including citations issued, as documentation that the surveillance activities are in fact being carried out as required under the terms of this agreement.

Signed on May 31, 2005

REDACTED

Agreed to by the California Tomato Commission

REDACTED

APPENDIX B

MEMORANDUM OF UNDERSTANDING BETWEEN
CALIFORNIA TOMATO GROWERS EXCHANGE AND
CALIFORNIA TOMATO COMMISSION

REDACTED

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REDACTED

P. 6

09 06 09:57a

REDACTED

P.7

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REDACTED

6.4

285:60 90:60

APPENDIX C

INDEPENDENT CONTRACTOR AGREEMENT

This Agreement is entered into as of the 1st day of February, 2006 between the California Fresh Tomato Growers Exchange ("the Company") and [REDACTED]

Independent Contractor. Subject to the terms and conditions of this Agreement, the Company hereby engages the Contractor as an independent contractor to perform the services set forth herein, and the Contractor hereby accepts such engagement.

Duties, Term, and Compensation. The Contractor's duties, term of engagement, compensation and provisions for payment thereof shall be as set forth in the estimate previously provided to the Company by the Contractor and which is attached as Exhibit A, which may be amended in writing from time to time, or supplemented with subsequent estimates for services to be rendered by the Contractor and agreed to by the Company, and which collectively are hereby incorporated by reference.

Expenses. During the term of this Agreement, the Contractor shall bill and the Company shall reimburse him for all reasonable and approved out-of-pocket expenses which are incurred in connection with the performance of the duties hereunder.

Confidentiality. The Contractor acknowledges that during the engagement he will have access to and become acquainted with various trade secrets, inventions, innovations, processes, information, records and specifications owned or licensed by the Company and/or used by the Company in connection with the operation of its business including, without limitation, the Company's business and product processes, methods, customer lists, accounts and procedures. The Contractor agrees that he will not disclose any of the aforesaid, directly or indirectly, or use any of them in any manner, either during the term of this Agreement or at any time thereafter, except as required in the course of this engagement with the Company. All files, records, documents, blueprints, specifications, information, letters, notes, media lists, original artwork/creative, notebooks, and similar items relating to the business of the Company, whether prepared by the Contractor or otherwise coming into his possession, shall remain the exclusive property of the Company. The Contractor shall not retain any copies of the foregoing without the Company's prior written permission. Upon the expiration or earlier termination of this Agreement, or whenever requested by the Company, the Contractor shall immediately deliver to the Company all such files, records, documents, specifications, information, and other items in his possession or under his control.

Conflicts of Interest. The Contractor represents that he is free to enter into this Agreement, and that this engagement does not violate the terms of any agreement between the Contractor and any third party. Further, the Contractor, in rendering his duties shall not utilize any invention, discovery, development, improvement, innovation, or trade secret in which he does not have a proprietary interest. During the term of this agreement, the Contractor shall devote as much of his productive time, energy and abilities to the performance of his duties hereunder as is necessary to perform the required duties in a timely and productive manner. The Contractor is

expressly free to perform services for other parties while performing services for the Company.

Termination. The Company may terminate this Agreement at any time by 30 working days' written notice to the Contractor. In addition, if the Contractor is convicted of any crime or offense, fails or refuses to comply with the written policies or reasonable directive of the Company, is guilty of serious misconduct in connection with performance hereunder, or materially breaches provisions of this Agreement, the Company at any time may terminate the engagement of the Contractor immediately and without prior written notice to the Contractor.

Independent Contractor. This Agreement shall not render the Contractor an employee, partner, agent of, or joint venturer with the Company for any purpose. The Contractor is and will remain an independent contractor in her relationship to the Company. The Company shall not be responsible for withholding taxes with respect to the Contractor's compensation hereunder. The Contractor shall have no claim against the Company hereunder or otherwise for vacation pay, sick leave, retirement benefits, social security, worker's compensation, health or disability benefits, unemployment insurance benefits, or employee benefits of any kind.

Successors and Assigns. All of the provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, if any, successors, and assigns.

Choice of Law. The laws of the state of California shall govern the validity of this Agreement, the construction of its terms and the interpretation of the rights and duties of the parties hereto.

Waiver. Waiver by one party hereto of breach of any provision of this Agreement by the other shall not operate or be construed as a continuing waiver.

Assignment. The Contractor shall not assign any of his rights under this Agreement, or delegate the performance of any of his duties hereunder, without the prior written consent of the Company.

Notices. Any and all notices, demands, or other communications required or desired to be given hereunder by any party shall be in writing and shall be validly given or made to another party if personally served, or if deposited in the United States mail, certified or registered, postage prepaid, return receipt requested. If such notice or demand is served personally, notice shall be deemed constructively made at the time of such personal service. If such notice, demand or other communication is given by mail, such notice shall be conclusively deemed given five days after deposit thereof in the United States mail addressed to the party to whom such notice, demand or other communication is to be given as follows:

If to the Contractor:

REDACTED

If to the Company:

REDACTED

Fresno, California 93720

Any party hereto may change its address for purposes of this paragraph by written notice given in the manner provided above.

Modification or Amendment. No amendment, change or modification of this Agreement shall be valid unless in writing signed by the parties hereto.

Entire Understanding. This document and any exhibit attached constitute the entire understanding and agreement of the parties, and any and all prior agreements, understandings, and representations are hereby terminated and canceled in their entirety and are of no further force and effect.

Unenforceability of Provisions. If any provision of this Agreement, or any portion thereof, is held to be invalid and unenforceable, then the remainder of this Agreement shall nevertheless remain in full force and effect.

IN WITNESS WHEREOF the undersigned have executed this Agreement as of the day and year first written above. The parties hereto agree that facsimile signatures shall be as effective as if originals.

REDACTED

REDACTED

SCHEDULE A
Amended January 2006

DUTIES, TERM, AND COMPENSATION

DUTIES: The Contractor will provide management services related to the operation of the company in keeping with the programs approved by the Board of Directors as to include: draft regulations, operational policy, bylaws and other documents to maintain the Capper-Volstead exemption held by the company; collecting and dissemination of industry statistics; staging of conference calls and meetings and recording of minutes; negotiate contracts with County and State offices; and serve as a liaison related to the surveillance and enforcement of Article 43 of the California Food and Agricultural Code; conduct audits of the membership to ensure compliance with approved operational policy; maintaining records; and, filing of required documents with federal and state agencies.

TERM: This engagement shall commence upon execution of this Agreement and shall continue in full force and effect through December 31, 2006. The Agreement may only be extended thereafter by mutual agreement, unless terminated earlier by operation of and in accordance with this Agreement.

COMPENSATION:

As full compensation for the services rendered pursuant to this Agreement, the Company shall pay the Contractor the sum of \$30,000 (Thirty thousand dollars), to be paid in three equal installments of \$10,000, (Ten thousand dollars), on March 1, July 1, and October 1, 2006.

APPENDIX D

INDEPENDENT CONTRACTOR AGREEMENT

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APPENDIX E

May 31, 2005

REDACTED

VIA FACSIMILE and certified mail

Subject: REDACTED

Dear [REDACTED]

I am writing in response to your questions to the Department of Food and Agriculture related to the California Fresh Tomato Growers Exchange and the California Tomato Commission.

As a matter of background, the major U.S. tomato producers in Florida and California each have mandated programs and Capper-Volstead cooperatives. In Florida, the Federal Marketing Order, the Florida Tomato Committee, provides administrative services to the Florida Tomato Growers Exchange; in this instance, the Committee provides full management and support services. In California, however, the Commission only provides space to the California Exchange. As a result, the service provided by the Commission is unlike that found in Florida; the California Tomato Commission does not provide management or other administrative services to the Exchange.

The Commission and Exchange, upon approval of the Board of Directors, entered into an MOU that provides for the Commission to provide filing cabinets, a non-proprietary computer, access to a copier and postage meter, and related office supplies at a base rate of \$2,400.00 annually. All other expenses, generally limited to miscellaneous support services, cellular phone usage, and actual postage, are invoiced by the Commission to the Exchange.

Unlike in Florida, the California Exchange has its own staff, each of whom are independent contractors and are compensated by the Exchange for their hours. In addition, the Exchange provides funding for and has its own phone and fax lines, auditor, insurance, and other administrative services; in addition, the Exchange has its own budget for travel, office equipment, and meetings.

As a matter of historical fact, the Exchange did go out to bid for such services, receiving bids from Monfort Management, which administers a number of State Marketing Orders and Commissions as well as Capper-Volstead cooperatives, and myself. The bids from each entity were essentially the same in terms of cost. The Exchange chose to contract with myself and the CTC on the basis of experience, not cost.

CDFA (CTC PRA)
198

There is no subsidizing of Exchange expenses by the Commission. The Commission maintains a coding mechanism, so that any expenses outside that provided by the MOU, such as postage, are easily identified and are then billed back to the Exchange. It is the same system that applies to Commission identification of expenses related to marketing, research, and administrative costs, as the Commission applies such costs back to specific programs not to a single line item.

At the May meeting of the Commission, a supplemental MOU was entered into with the Exchange, which provides for the Commission to provide support services related to the enforcement of Standardization's regulations related to fresh tomatoes. The Exchange provided the Commission with \$160,000 in funding at the signing of the MOU that is held in an account separate from that of the general funds of the Commission. The Commission will enter into contracts with various County Agricultural Commissioners and CDFA, which provides for those agencies to provide enforcement in the field and terminal markets. A portion of the funding will be reserved to offset any out-of-pocket expenses of the Commission, such as postage, reports, and a new 24 hour/7 day-a-week telephone answering service that will receive complaints on gunnysacking and mislabeling. The MOU provides that the Commission will return unspent funds to the Exchange or invoice the Exchange for costs over and above the \$160,000 at the end of the contract.

REDACTED

Sincerely,

REDACTED

cc:

REDACTED

3
CDEA (CTC PRA)
200

APPENDIX F

Response to the CDFA Audit Question 15

Gunnysacking is a term used to describe the illegal packing of tomatoes for fresh tomato. This product is illegally in the system, often sold on a "cash" basis, and without any regard to State Ag Code provisions, Cal-OSHA requirements, or taxation.

In 2004, there were numerous reports of gunnysacking activity. [REDACTED], and a number of other firms filed reports with the Commission and CDFA. CDFA cited a number of individuals for gunnysacking, including [REDACTED] and others.

Working in cooperation with Standardization, the Commission used the information from the citations to seek payment of assessments due from the gunnysackers that were commercial in size and scope. This included: [REDACTED] and [REDACTED]. These efforts failed.

In the billings of [REDACTED], the initial services of [REDACTED] (October 6, 2004 billing) were related to the broad issue of misbranding and unfair competition and the more specific issue related to a gunnysacker who illegally packed tomatoes from the field of an Exchange member. These expenses, in the amount of \$1,680.00, (hours of 1.5, 1.6, 3.1, and .9) were exploratory and are that of the Exchange.

On September 10, the focus of the illegal activity moved from violation of Exchange policy to the more serious issues of various State code violations, including that of the California Tomato Commission assessment provisions. It is at this point in the billings that the liability for payment to [REDACTED] moved from the Exchange to the Commission due to the assessment collection issue.

The justification for the shift is the result of the potential benefit that could be realized if legal action was taken against the largest gunnysackers, who were illegally reusing the boxes of a number of legitimate shippers, including [REDACTED] both in and outside of the Exchange.

While the initial thought was to take action through the Commission, the lawsuit, [REDACTED], believed, could only address the collection of assessments due, and would not address the real issue – that of illegally marketing tomatoes in California, mislabeling, and the disregard for food safety concerns as noted by the U.S. Food and Drug Administration in February 2004, and thus while the lawsuit was initiated by the Exchange, partial costs were paid by the Commission as the Commission would benefit from any settlement reached.

The result was a lawsuit filed by the Exchange that would, if successful, provide long-term financial benefit to the Commission in the form of assessment revenue,

and would address the mislabeling issue impacting shippers within and outside of the Exchange, including non-members [REDACTED] all of whom had complained about the reuse of their containers by gunnysackers. One shipper, [REDACTED] had asked the Commission take legal action on their behalf against the gunnysackers.

One gunnysacker, [REDACTED], agreed to an out-of-court settlement that included the paying of back assessments to the Commission. [REDACTED] has since paid their assessments to the CTC resulting in a long-term financial benefit to the Commission. The other two individuals were not served as they could not be located.

While the settlement also provided for [REDACTED] to paid an amount to the Exchange that would be used to maintain surveillance activities on the Los Angeles terminal market, he has failed to do so. Given the closure of the Exchange, they will not pursue any further collection activity against [REDACTED]. He, however, continues to pay assessments to the Commission.

Thus, the only benefit from the litigation has been to the Commission in the form of assessment revenue; to the State in the form of his registration as a handler, and the resulting payment of other assessments due, including to the [REDACTED] program; and Standardization.

One other benefit, is that to the public, in that [REDACTED] has since changed his operation from one of gunnysacking to that of a legitimate handler, where he is using new containers, and attempting to meet the directives as set forth by the FDA.

In summary,

This expense is one that I, as CEO, determined to be appropriate for the Commission to pay due to the nature of the violations and the remedy that would result in an on-going revenue flow to the Commission. My actions were disclosed to the Executive Committee.

The expenses related to the lawsuit totaled \$10,169.17. Based upon an analysis of the [REDACTED] invoices, the fact that the invoices included multiple file numbers that were not properly taken into account by the [REDACTED] bookkeeper at the time payments were issued, resulted in the Commission not properly invoicing the Exchange for certain non-related legal services. The amount owed by the Exchange to the Commission according to my computation is \$2,880.96. All other expenses should be that of the Commission given the context of the litigation and benefits to the Commission and public.

APPENDIX G

**Minutes of the California Tomato Commission
Executive Committee Meeting**

San Diego Hilton Resort

REDACTED

REDACTED

2002 Salary Schedule

Employee	Base 2001	Base 2002	Adjustment	403B Contribution	Monthly Gross	Exchange Cap
■	\$92,145.00	\$95,000.00	\$2,855.00	\$4,750.00	\$7,916.67	\$11,250.00
■	\$42,000.00	\$44,500.00	\$2,500.00	\$2,225.00	\$2,781.25	\$4,750.00
■	\$47,500.00	\$55,000.00	\$7,500.00	\$2,750.00	\$4,583.33	
■	\$47,500.00	\$55,000.00	\$7,500.00	\$2,750.00	\$4,583.33	
	\$229,145.00	\$249,500.00	\$20,355.00	\$12,475.00		

Adjustment:

Adjustment for Less than Full Time

50% time at 75% of salary \$33,375.00

\$2,225.00

Year End Bonus - To be paid prior to March 1.

Exchange Quarterly Billings

■ \$15,000.00 Net
■ \$2,500.00 Net

■ \$2,812.50 March 1, June 1, Sept 1, Dec 1
■ \$1,187.50 on March 1; Hdy at \$50 thereafter

CALIFORNIA TOMATO COMMISSION RESPONSE

The California Tomato Commission's
Response to the CDFA's
Draft Audit Report

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The California Tomato Commission's Response to the CDFA's Draft Audit Report

1. INTRODUCTION AND REQUEST RE PUBLIC RECORD

The California Tomato Commission submits the following response to the Draft Audit Report of the California Department of Food and Agriculture Audit Office dated December 15, 2006 (Audit Report #06-070) and requests that the entirety of its response, together with all accompanying exhibits, be made part of the public record.

2. PRELIMINARY STATEMENT

The California Tomato Commission has investigated the reported findings made by the CDFA Audit Office and considered its recommendations. Throughout its history, the Commission has endeavored to comply with its statutory mandates, improve the California fresh tomato industry, and serve the public interest. Consistent with the Commission's enduring commitment and good faith in discharging these duties, the Commission voluntarily will agree to the majority of the CDFA's recommendations, notwithstanding its reasonable disagreement and dispute with many of the findings which form the basis of those recommendations. (*See infra*, Response to Key Recommendations.)

The Commission addresses the CDFA's specific findings and recommendations in detail below. However, the Commission also contends that the following general factors are

material to its response and should be considered by the CDFA in making its final determinations.

As set forth in the Commission's governing statute, its purpose is to promote the California fresh tomato industry. *See, e.g.,* Cal. Food & Agr. Code § 78604 (. . . the Commission is necessary to carry out the California tomato industry's commitment to the efficient development and management of a national and international advertising and promotion program which, combined with the research program, will enhance the competitiveness of the California tomato industry within the national and international marketplace.") and § 78605 ("continue and enhance . . . research . . . resulting in increased consumer value and enhanced grower returns"). Importantly, section 78610 emphasizes the need for the Commission to create new markets:

Opportunity exists for continued growth and expansion of the tomato industry by creating new markets in major portions of this country. The success of such an expansion program is uniquely dependent upon effective advertising, promotion, and research, since the creation of new markets is essentially a matter of educating and informing people of the use, nutritional value, and availability of the commodity. The expansion of the tomato industry also provides an important source of jobs for many people in this state, a high proportion of whom reside in historically depressed areas of the state, and serves to ensure the preservation of an agrarian society.

The Commission's mandate to promote a commercial product ("uniquely dependent upon effective advertising, promotion, and research") and open new markets, of course, distinguishes it from a traditional government agency.

It is virtually undisputed in the agricultural industry that commissions generally were created to operate, and have operated, in a business-like environment that is different from that in a government agency or a marketing order. Based upon the Audit Report, it appears that the Commission is being held to strict standards applicable to a government agency, funded by general tax revenues instead of by assessments from the industry itself. The auditors have exhibited little appreciation of how certain events and activities, about which they express skepticism, promoted fresh tomatoes in California commerce and served the statutory purpose for which the Commission was created. While the Commission does not necessarily object to the CDFA imposing "government" standards equally upon all commissions going forward in the future, it does object to being singled out in hindsight for a purported failure to comply with government standards to which it reasonably did not understand it was subject.

This is especially true given the virtual absence of any meaningful guidance or oversight from the CDFA since the Commission's inception through the audit period. There have been no comprehensive or clear mandates from the CDFA to inform commissions as to the government standards with which they are expected to comply. The Tomato Commission's statute, for example, expressly requires compliance with the Public Records Act and The Bagley-Keene Act (open meetings), but is silent as to a vast array of other government-related laws and regulations. Moreover, there have never been any material objections by the CDFA specific to the Tomato Commission's programs during the entire audit period or prior. On the contrary, the CDFA routinely has been represented at Commission Board meetings and, without exception, the Secretary or his representative, Lynn Morgan, has concurred with the Commission's budgets. The CDFA representative was present at all but the most recent Board and Executive Committee

meetings where issues or decisions which now are being criticized were not questioned, much less challenged, at the time. Taken together, the prevalence of a business culture in commissions and the absence of oversight or objection by the CDFA make much of the criticism in the Draft Audit Report fundamentally unfair.

Finally, the auditors make reference in the Report to various total amounts expended in certain categories, often in the hundreds of thousands of dollars, where only a portion of the total actually raises any question, this is misleading. The Commission clarifies amounts in issue throughout its Response. During the time period covered by the audit, approximately 44 months, total expenditures of the Commission amounted to roughly \$7 million. Of that amount, the Commission has approximated that only 1% of those expenditures are actually at issue in the Audit Report. This amount is immaterial by most standards but, in any event, is hardly an indicia of a pervasive misuse of funds as implied in the Audit Report. Indeed, the total cost of this audit, including branch charges and professional fees, will exceed the amount of reimbursable items and result in little, if any, real benefit to the industry or public.

For these reasons, and mindful of its substantial achievements discussed below, the Commission is concerned and aggrieved with the accusatory tone of the Audit Report, particularly in light of the incomplete and, in many cases, inaccurate analysis of the documents and facts previously provided. As stated above, the Commission will, in good faith, cooperate to resolve the CDFA's recommendations even where the Commission believes the recommendations to be unnecessary. But the Commission also expects to receive from the CDFA objective and fair treatment.

3. HISTORY AND ACHIEVEMENTS OF THE CALIFORNIA TOMATO COMMISSION

Because the Audit Report suggests that the Commission has not always operated in the "best public interest," and recommends that it do so in the future, it is important to understand the Commission's achievements for the California fresh tomato industry and the public in general. Relative to its many accomplishments in service of the industry and the public, the reportable findings in the Audit Report may be placed in the proper perspective. A summary of the Commission's history and achievements has been narrated and documented by its former Chief Executive Officer with review and input from staff, and may be found at Exhibit A. Set forth immediately below are highlights from the complete exhibit.

The transition to that of a Commission from The California Tomato Board was largely in response to the decline in applied research available through the University of California and the departure of the tomato breeder at UC Davis. Faced with an uncertain future of securing qualified researchers, the Commission was established to enable research with both public and private entities beyond the UC system that is traditionally linked to marketing orders. Since that time, the Commission entered into research agreements with Asgrow and Harris Moran seed companies, University of Arkansas, BYU, Cornell, Oregon State, and USDA, for research that is of importance specifically to the California fresh industry.

While the Commission was founded primarily to fund production research, its mission has changed as the issues facing the industry have changed. The California fresh tomato industry may represent better than 400 million dollars in sales, however, the industry is actually quite small, with the majority of production centered in the San Joaquin Valley and South Coast, and fifteen firms representing nearly all production. The number of growers has declined significantly with the vertical integration of the industry.

Thus, the Commission is unique in that nearly all firms have been represented on the Commission's Board of Directors in the past five years - including Ace Tomato, EEE Produce, San Joaquin

Tomato Growers, DiMare, Red Rooster, Central California Tomato Growers, Live Oak Farms, Sun Pacific Shippers, Gonzales Packing, OP Murphy and Sons, Deardorff Jackson, and Oceanside Produce. History shows, in 2001, at the time of the public hearing of the California Tomato Commission, there was no opposition to its continuation. In 2006 [prior to the commencement of audit and litigation], very limited opposition from the Salinas Valley was received.

The Commission has achieved a long list of accomplishments in betterment of the industry and service to the public, which are described more fully at Exhibit A. The Commission is proud of these accomplishments, the highlights of which are summarized here:

- *Measuring the success of the program long-term, researcher John Trumble, on contract with the Commission since its inception, estimates that the reduction in pesticide use within the fresh tomato industry directly attributable to the Commission's research effort is 50%.*
- *Over the years, the Commission was successful at obtaining a number of section 18 exemptions for its growers - including for Admire, a less toxic control of whitefly, Tattoo-C, a fungicide for controlling late blight, and Rally, a fungicide for the control of powdery mildew.*
- *For example, in the Salinas Valley, powdery mildew and late blight are major diseases. The problem is of less significance elsewhere, however, the Commission responded to the needs of the Salinas industry (Gonzales Packing, OP Murphy) specifically related to their needs.*
- *In a unique partnership, the Commission organized a number of transplant houses . . . to enable a Section 18 exemption for Tattoo-C, to control late blight . . . The transplant industry volunteered funds . . . As a result of this joint effort, growers were assured of having disease-free transplants.*
- *More recently, the Commission successfully petitioned the U.S. EPA on behalf of its Southern California producers, who produce on a limited amount of agricultural land in San Diego, Orange, and Ventura Counties, to obtain Critical Use Exemptions (CUE), providing for the continued use of Methyl Bromide (MB). . . . [without which] a number of growers stated they would have no alternative but to stop producing.*
- *The Commission was recognized by the U.S. EPA in 2003 as a "Champion" in the area of risk reduction.*

- *And, from this document[*strategic plan for reduction of pesticide use*], has developed guidelines for grower's to manage pests and disease with a reduced level of pesticide use, based upon the concept of Integrated Pest Management. This document was distributed to all growers and shippers under Commission law.*
- *In partnership with USDA, the Tomato Board and/or Commission were funding sources for research that would eventually lead to Japan lifting their 40-year quarantine on U.S. tomato imports. . . . the economic return to the industry has been very significant.*
- *The Commission, working with researcher John Trumble, developed a paper on the potential risk associated with mealy bug infecting fresh tomatoes that was provided to the Mexican government. In response, the government relaxed, then eliminated the quarantine on California tomatoes from Imperial County exported to Mexico.*
- *As a result of Mexico eliminating its phytosanitary restriction on California tomatoes which required tomatoes to be free of stems and leaves, the Commission addressed the interests of specific shippers] The stems and leaves issue was primarily that of three shippers - Central California Tomato Growers, Gonzales Packing, and Sun Pacific Shippers. These three shippers reported significant business in Mexico, and thus, any impediment to free trade had economic consequences to these companies.*
- *Thus, with the lifting of this [phytosanitary] barrier, there is equal access between the U.S. and Mexico for the first time.*
- *In 1999, the Commission funded the first "tomato specific" Good Agricultural Practices (GAP) document, through the efforts of researcher Trevor Suslow. The document has been made available to growers and shippers and has been subject to periodic updates.*
- *The findings [of Dr. Suslow's survey through the research program], confidential to the sheds, detailed weaknesses in their own reduction of microbial contamination, such as salmonella and ecoli, and will enable these operations to improve their own food safety efforts.*
- *In response to the FDA letter [to the Commission re food safety], the Commission created a task force to develop the first national guidance document for fresh tomatoes. The document was presented to FDA and is found on their website: <http://www.cfsan.fda.gov/acrobat/tomatsup.pdf>. The document was drafted in conjunction with FDA and was distributed by the Commission to all growers and shippers in California, made available to retailers, food service, and others in the trade. The document is widely available on the internet as an educational tool as envisioned by FDA. And, the Commission has been praised by FDA for its efforts.*
- *As noted in the transcript of the 2005 Salinas hearing . . . Subway echoed their support of the Commission in the April renewal hearing of the Commission based up the past efforts of the Commission related to food safety.*

- *Because of the uniqueness of tomatoes and increasing competition from Canadian greenhouses, the Commission considered a number of options] One, circa 1999-2000, was the development of a "California grown" campaign at Save Mart Supermarkets that would test consumer acceptance of a program that embraced locally grown product over imported product from Canada or Mexico. The test was so successful that the concept emerged into a State-led effort proposed by the Commission to then Secretary Bill Lyons at the California Tomato Conference held in San Francisco, and to the Agricultural Issues Forum, who helped lead the formation of the Buy California Marketing Agreement.*
- *As noted at the Buy California public hearing, the California industry was under attack, facing severe economic consequences from the dumping of Canadian greenhouse tomatoes in California . . . Through the efforts of the Commission, the BC Vegetable Commission, and Ontario Greenhouse Growers, the anti-dumping action was halted without prejudice. And, there was an immediate increase in market share for California tomatoes in the Western United States due to higher prices for the Canadian product. The resulting benefit to the California growers and shippers was in the millions of dollars.*
- *Through this ad-hoc effort [in leading the formation of the North American Tomato Trade Work Group (NATTWG), comprised of tomato producers throughout North America and attended by representatives of the governments of the three North American trading partners – United States, Canada and Mexico], the California Tomato Commission has been able to help lead a harmonization of arrival standards (grading standards) for U.S. tomatoes shipped to Canada and in the harmonization of pesticide MRL's between all three trading partners.*
- *The complexities and competitive nature of the North American marketplace required that the Commission make significant investments in export marketing, done largely through its participation in the USDA funded Market Promotion Program. . . . The Commission's involvement with FAS was at first on a stand-alone basis. However, USDA required that the Commission bring the Florida Tomato Committee into the program so that a united effort would be made in growing U.S. exports.*
- *The California Tomato Commission is one of the best performing participants in the USDA program, with an above average rating as compared to the all other programs.*
- *Since the opening of Japan to U.S. tomatoes, when \$153,000 of tomatoes were sold, the market has undergone a number of changes, resulting in a refinement of market strategy. The new strategies employed by the Commission in 2006, that of creating new menu items, was successful with sales increased by 55% to 2.6 million dollars.*
- *While the Commission has a number of retail and other promotions in Canada and Mexico, among the most successful events are trade missions and reverse trade missions that are open to all of industry. Most of industry has participating in these events over*

time, including but not limited to Gonzales Packing (Mexican Reverse Trade Mission: Sacramento/Rio City), and Central California Tomato Growers (Mexican Reverse Trade Mission: Fresno, Flemings; Trade Mission to Mexico).

- *The Quality Task Force, comprised of produce leaders from throughout North America, including representatives of Wal-Mart, the largest retailer in the U.S. for California tomatoes, the advisory committee played an important role in the development of food safety guidance for the industry.*

4. RESPONSE RE REPORTABLE FINDINGS

(i) Relationship Between Commission and Exchange

It appears that one of the CDFA Audit Office's primary concerns, based upon the report as a whole, is that the "Commission and the private 'agricultural cooperative,' the California Fresh Tomato Growers Exchange (Exchange) appeared to operate as identical in interest and organizationally on many occasions." (Report, p. 2) (*See also* Report, p.7: "the Commission and the Exchange appeared to operate like they had identical interests and in the same organization . . . The separateness of their identities became confused and merged.")

This proposition is fundamentally erroneous. The Commission and the Exchange served entirely different and distinct functions and operated separately and independently for all material purposes. The use of common staff and other resources was fully disclosed, arranged at arms length, and the subject of written MOU's. In any event, such use of common resources is not by itself improper and was never used as an instrument of concealment or wrongdoing.¹

¹ The auditors assert but do not support their alter ego conclusion. The principle of alter ego has been explained as follows:

There is no foundation for the CDFA's presumption that the Commission's and Exchange's identities were co-extensive or that their relationship was "unusual." (Report p. 7) (*Please see* discussion below regarding management of the Exchange for more detail.)

As reflected in the following chart prepared by Employee A, the functions of the two organizations do not overlap. Significantly, the Exchange was formed as a Capper Volstead Cooperative, but the Commission, of course, was not. For an explanation of the Capper Volstead antitrust exemption, please visit the USDA website <http://www.rurdev.usda.gov/rbs/pub/cir35.pdf>. A full explanation of the differences between the Commission and the Exchange is appended hereto as Exhibit B, along with accompanying documentation including MOU's and portions of the Exchange's operational policy.

Chart 1
Activities of the Respective Organizations

<u>Area</u>	<u>Exchange</u>	<u>Commission</u>
Research Program	None	Yes
Domestic marketing and promotion	None	Yes
Export marketing and promotion	None	Yes

The terminology "alter ego" or "piercing the corporate veil" refers to situations where there has been an abuse of corporate privilege, because of which the equitable owner of a corporation will be held liable for the actions of the corporation. The requirements for applying the "alter ego" principle are thus stated: It must be made to appear that the corporation is not only influenced and governed by that person [or other entity], but that there is such unity of interest and ownership that the individuality, or separateness, of such person and corporation has ceased, and the facts are such that an adherence to the fiction of separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice."

Roman Catholic Archbishop of San Francisco v. Sup. Ct. of Alameda Co. (1971) 15 Cal.App.3d 405, 411; internal citations and quotation marks omitted.

Governmental Affairs Program	None	Yes
Party to the Suspension Agreement With Mexico	Yes	No
Party to the Anti-dumping action With Canada	No	Yes
Historical Data Gathering on Volume	No	Yes
Forward Looking Volume Protections	Yes	No
Regulates Pricing	Yes	No
Volume Controls	Yes	No
Restriction on Producer Sales	Yes	No
Reporting of Actual Selling Prices to Members	Yes	No
Fines for violation of policy	Yes	No
Meetings of the Board	Yes	Yes
Primary means of meeting: Telephone	Yes	No
Assessments paid by Growers	Yes	Yes
Assessments paid by Handlers	No	Yes
Role of Ed Beckman	Advisor	CEO

Based upon the erroneous presumption that “the Exchange and the Commission operated as if their interests were identical and they were organizationally the same,” the CDFA concludes that “the Exchange did not, in fact, represent the interests of all assessment payers.” (Report, p. 7) Confusing the issue and misstating the facts, the CDFA states that there are “over 400” growers and 30 handlers who pay *Commission* assessments but that the *Exchange* “appears

to have been composed and led by 4-5 handlers and related growers who together produced, according to some estimates, 90% of the product for market.”

The Commission is unaware of any basis for the auditor’s statement. The proposition that a Capper Volstead Cooperative is “led by 4-5 handlers” reveals a fundamental misapprehension of the California Tomato Industry . Any review of Commission assessments would show that it is impossible for four or five handlers to control 90% of the product. Moreover, factually, there are fewer than 100 growers in the California fresh tomato industry, not 400, and all industry members were invited to join the Exchange. There is no support, and none is offered by CDFA, for the general assertion “[w]hile the Exchange represented the interests of only a portion of the industry, all of the industry paid for the activities that included those that supported the Exchange and the Exchange *appeared to have access to the information of all assessment payers.*” (Report, p. 7) Under the Capper Volstead exemption from Federal law and similar California exemptions for farmer cooperatives, the Exchange members were entitled to share information that could not be shared by Commission members because of restrictions protecting growers confidential information. [*Please see Exhibit B.*]

As noted above, all industry members were invited to join the Exchange. And, the Commission is not aware of any substantial evidence to support the auditors’ broad assertion that it “appeared” that Commission assessments generally funded Exchange activities. The few specific items of the Commission purportedly “funding” Exchange activities identified by the auditors are relatively minor and, moreover, such instances have been fully explained do not

support the auditors' broad assertions, and have been, or are in the process of being, remedied.

(Please see below.)

The following is a portion of additional information which was provided by Employee A to further explain the limited relationship between these two entities. The complete summary of the Exchange's purpose, functions, and operations may be found at Exhibit B.

The California Fresh Tomato Growers Exchange was formed by producers in response to declining profitability in the 1990s. The original founders, meaning, those who invested in the legal expenses, included most of the mature green producers, including Central California Tomato Growers. *Those producers viewed the formation of a Capper Volstead Cooperative, as had existed in Florida for many years, as the model for the new entity that would be tightly focused on pricing issues.*

It was never the intent that the Exchange would compete with the California Tomato Board or the Commission which would be established shortly thereafter. The intent was for the Exchange to provide services that are unique to cooperatives, thus complimenting whatever generic programs were undertaken for industry.

All industry members were invited to join the cooperative. Through the years, nearly all producers, except those aligned with Gonzales Packing, Sunrise Tomato (now defunct), Red Rooster, and Deardorff Jackson, have either been aligned with the start-up of the organization and/or served on the Board of Directors. All individuals who have served on the Exchange Board of Directors have at one time or another also served on the Board of Directors of the California Tomato Commission. This is due to the size of the industry being compact, with few small operations, and thus, there is an overlap of both companies and individuals.

The MOU between the Commission and Exchange was originally drafted by the Commission's legal counsel of Kahn Soares and Conway. *The MOU was drafted to be in compliance with the Department's Policy for Commissions; the specific guidance was and continues to be the management of Commissions by*

Associations, which, the Department's representative to the Commission Dennis Manderfield, repeatedly expressed would be acceptable to the Department as the basis for any MOU. It should be noted, the MOUs were always subject to Board approval in the presence of CDFA and Mr. Manderfield never objected to the MOU, nor the terms of the compensation to the Commission from the Exchange. Further, Mr. Beckman brought to the attention of the Department in April 2006 at the Commission's renewal hearing, the structure of the MOU, the input of the Department in the development of Commission policy related to the management of other organizations.

It should be noted, that formality of the relationship between the Exchange and Commission were fully disclosed at all meetings of the Commission where the subject arose; any liabilities of the Exchange to the Commission were disclosed to the Board and Department at meetings and in the submission of the audited financial statements. At no time did Mr. Manderfield express any concerns related to the liabilities or financial arrangements between the two organizations as presented during meetings of the Commission. Nor, did the Department object to the terms of the compensation, in that the budgets of the Commission were concurred by Marketing Branch Chief Lynn Morgan on an annual basis.

Hence, there is no "merging" of the Commission' and the Exchange in terms of the respective organizations' purposes or operations. They were formed for different reasons to accomplish different goals. Neither has there been any concealment of the relationship. On the contrary, the existence and terms of the relationship have been fully disclosed and effectively approved by the CDFA.

The Commission's independent auditor explains in a separate submission that the entities also were treated separately for financial statement purposes and observes that the auditors did not identify errors in that regard:

Relationship Between Commission and Exchange

As set forth in the Draft Audit Report (page 9), the Tomato Commission established an account in its general ledger that was used to track expenses incurred and paid on behalf of the Exchange. The Draft Audit Report notes that \$105,000 of the Exchange's expenses were paid by the Commission and that the Exchange subsequently reimbursed these amounts. Note 2 to the Tomato Commission's February 28, 2006 Financial Statements identifies a receivable to the Commission from the Exchange in the amount of \$5,020. Although the Draft Audit Report expresses a concern regarding the separateness and the independence of the Commission and the Exchange and the documentation of their relationship, it does not identify any substantial errors in the Commission's financial statement arising from their relationship.

As notes in the Draft Audit Report (page 12), two invoices (for website design and legal fees totaling less than \$12,000) were erroneously paid by the Commission for services rendered to the Exchange. As noted in the Draft Audit Report, the website charges were reversed and the Exchange reimbursed the Commission for the Exchange's portion of the costs. Unfortunately, the Draft Audit Report does not state the date of these invoices so it is not possible to determine whether these transactions were in any period audited by Mr. Carter.

Indeed, in the Executive Summary of the Audit Report, the CDFA highlights only two monetary items between the two entities: that the Commission paid \$48,000 to a website design firm of which \$5,585 was attributable to the Exchange's website. As the CDFA learned during audit, and the independent auditor above observed, an employee did not allocate that amount to the Exchange inadvertently due to the fact that the website design firm billed the total amount without a breakdown. As CDFA admits in the Report, the employee "acknowledged that an error had occurred and the Exchange reimbursed the Commission for this portion of the cost" (Report, p. 2)

The only other highlighted item in the Executive Summary concerning expenses is approximately \$6,800 in legal fees which “were invoiced to the Exchange but were paid for by the Commission.” Contrary to the CDFA’s presumption that the Commission’s payment of a portion of the Exchange’s legal fees was due to “internal control weaknesses” precluding staff from “differentiat[ing] between an expense of one company versus the other,” the Commission intentionally paid for a portion of the legal fees incurred by the Exchange in *California Fresh Tomato Growers Exchange v. Romas R Us, Inc., Maya Fresh, Inc.*, Fresno County Superior Court, No. 05 CE CG 00537, filed November 23, 2005.

The decision to allocate a portion of the *Maya Fresh* legal fees to the Commission was because the Commission received tangible benefits directly as a result of the litigation, including the Commission’s collection of assessments from Ricardo Meyer of Romas R Us. The litigation also produced public and industry benefits directly related to the Commission’s purpose and business which are difficult to quantify. These benefits include, for example, the cessation of certain gunnysacking activity, which was a subject of the suit, benefiting the industry in general and non-exchange members such as Gonzales Packing whose boxes were being used in particular. (*Please see* discussion of gunnysacking and surveillance below.) Moreover, the suit led to payment of assessments in connection with the State’s standardization and curly-top programs which further serves the public interest.

Notwithstanding the benefits to Commission and other state programs, the Commission has reviewed the legal fees incurred in the *Roma R Us* and *Maya Fresh* litigation and determined that the total fees paid by the Commission for the litigation amounted to at least

\$10,169.57 and also determined that there was an additional \$2,880.96 for other services invoiced to the Exchange. In light of the benefits to the Commission and its members, the Commission believes it was appropriate for Commission to pay these legal fees. However, to resolve the matter, and compromise the issue of who benefited from the litigation, the Commission has requested the Exchange to reimburse the Commission for \$10,000 in settlement of the issue and the Exchange has agreed to do so.

Concern is raised that Employee A managed both the Commission and the Exchange, and received compensation for doing both. However, the concern is vague, ambiguous and unsupported by evidence of wrongdoing or impropriety. As mentioned above, a detailed analysis of the purposes and functions of the Commission and Exchange is provided in Exhibit B and demonstrates that, for all material purposes, the entities were separate and independently managed.

In addition, the Commission requested and received a detailed explanation from Employee A regarding the relationship of these two entities and his role in each. This explanation is important and should be carefully considered:

The preliminary audit is incorrect in its assumptions and conclusions regarding Employee A's involvement with the California Fresh Tomato Growers Exchange. At the Commission, Employee A's role was that of CEO as provided for in the bylaws. At the Exchange, Employee A's role was primarily that of facilitating discussion among the members, ensuring compliance with all guidelines involving a producer cooperative established under the Capper-Volstead Act, and the auditing of compliance with Operational Policy, which governs the cooperative's membership. Thus, while Employee A's role at the Commission

was broad, the same cannot be said for Employee A's role at the Exchange, where the programs of the Exchange are narrow in scope and not in conflict with that of the Commission.

The California Fresh Tomato Growers Exchange was formed in compliance with the Capper-Volstead Act, providing anti-trust exemption to an association of producers, meaning, farmers who associate under an association, or associations that associate with other like associations.² There are a number of well-known Capper-Volstead Cooperatives, including Oceanspray Cranberries and the recently formed California Citrus Growers Associations. As noted by University of California researcher Shermain Hardesty, Capper-Volstead Cooperatives have had a long history in California agriculture.³ The requirements of a Capper-Volstead Cooperative are that the association must be operated for the mutual benefit of its members, and that the membership is limited to that of producers of agricultural products. Further, that the cooperative must not deal in the products of non-members in an amount greater in value than such products it handles for its members.

The California Fresh Tomato Growers Exchange was formed by a super-majority of the California fresh tomato industry and was based upon a successful and long-standing format used in the Florida industry, where multiple organizations are managed by the mandated program, in this case, Federal marketing order 966 operating under the authority of the U.S. Secretary of Agriculture.

Employee A's role is not unlike that of Mr. Reggie Brown, who is the Executive Director of the Florida Federal Marketing Order – Florida Tomato Committee; Executive Director of the Florida Tomato Exchange, a non-profit association; and manger of the Florida Tomato Growers Exchange, producers cooperative established under the provisions of Capper-Volstead Act for agricultural cooperatives. Mr. Brown, and his predecessor, Mr. Wayne Hawkins, has/have provided such services to the Florida fresh tomato industry without the objection of the United States Department of Food and Agriculture for more than thirty years.⁴ The concept in Florida was to provide complimentary not competitive programs utilizing both marketing order and association formats; the same concept holds true in California where the two organizations, the Commission and the Exchange,

² <http://www.rurdev.usda.gov/rbs/pub/cir35.pdf>

³ http://www.agecon.ucdavis.edu/outreach/update_articles/v8n3_4.pdf

⁴ Correspondence of Reginald L. Brown to Employee A, dated January 29, 2007., Exhibit C.

carry on their own programs, funded by their respective members, and decisions are made by their own independent board of directors.

Throughout Employee A's tenure as CEO of the Commission, he has maintained detailed discussions with the California Department of Food and Agriculture related to the relationship between the two organizations. These communications began with a request to CDFA's then appointed economist to the Commission, Glenn Yost on March 24, 1997, to review the proposed MOU between the two organizations.⁵

Such discussions were ongoing as the Memorandum of Understanding between the two groups evolved, and as Employee A's role changed. At no time did the Department express any concern related to Employee A's dual-role responsibility.

CDFA Commission Branch Policy, C107.1, in effect at the time of an email from Dennis Manderfield to Employee A dated August 24, 2005, detailed the Branch regulations governing the association of mandated and other organizations.⁶ As noted by Mr. Manderfield, while Branch policy was for associations that would manage a mandated program, the reverse situation would also be governed by the Branch policy. This discussion between Mr. Manderfield and Employee A was one of numerous discussions related to Employee A's dual role and what steps were to be taken to avoid any possible conflict of interest.

Policy C107.1 was adopted by the Branch given the fact that there are similar positions within other California agricultural-based industries, where Commissions provide managerial or other support services to or are allied with other mandated programs, including Pistachios, Avocados, and Tree Fruit. Further, Monfort Management Services, provides managerial services to a number of cooperatives, marketing orders, and commissions, and all within one office and therefore requiring that their staff wear multiple hats. There are a number of other mandated programs, including California Cherry Advisory Board, where the manager of the marketing order also serves as the manager of an association and/or research foundation. As a former employee of Monfort Management, Employee A was aware of how services to one commodity board or association were isolated from that of other boards for the purpose of billings and such knowledge was used to establish the protocol used at the Commission office.

⁵ March 24 correspondence Employee A to Glenn Yost, with attachments, Exhibit D.

⁶ Email from Dennis Manderfield to Employee A, dated August 24, 2005, Exhibit E.

Employee A's role with the Exchange was fully disclosed during Commission Board of Directors meetings in the presence of Dennis Manderfield, as noted in the minutes of the Commission since 2001. In addition, Employee A's role and compensation related to the Exchange was also reported on Employee A's Form 700 disclosures to the California Fair Political Practices Commission for the California Tomato Commission.

As Mr. Manderfield can attest to, when subject matter arose at a Commission meeting that was that of the Exchange or in any fashion related to the Exchange, Employee A promptly closed discussion, warning members that such matter was not appropriate for Commission meetings. As noted in the detailed analysis of the functions of the two organizations, each organization served a unique and separate purpose, and thus discussion and/or action related to a given issue was generally appropriate for one entity or the other, not both.

At no time, since the original MOU between the two entities was approved in 2001, has the Department raised any concerns at any meeting of the California Tomato Commission related to the relationship of the two entities or the dual managerial role. Nor has the Department in any other forum raised concerns or objections to the relationship between the two entities until the Cease and Desist Order was issued in September 2006.

As in Florida, the California fresh tomato industry is small in scope and most of industry participates in multiple organizations and is accepting of the dual role. In California, the dual management role had been supported by industry without any formal or otherwise objection from any industry member until 2005 – four years after such an arrangement first began.

In Employee A's dual role, he is subject to confidentiality agreements from the Commission and Exchange. The confidentiality agreement of the Commission is required of all employees and was first adopted by the California Tomato Board, the marketing order that preceded the Commission. *As Employee A noted at the time of the audit to Mr. Shakil Anwar, there have been two documents referencing Employee A's involvement with the Exchange. Mr. Anwar's statement in the preliminary report, that no such documents existed, was incorrect, and Anwar misrepresents Employee A's statements regarding the existence of such documents. As noted, there are two such documents - the first being certain Operational Policy documents that were proprietary*

to the Exchange and, second, Employee A's independent contractor agreement, which contains a confidentiality agreement. While Employee A was unable to provide a copy of the Operational Policy document at the time of the audit due to those documents being the property of the Exchange, Employee A did provide a copy of the independent contractor agreement. Mr. Anwar had access to the confidentiality agreement of the Commission, which was maintained in Employee A's personnel file.

As noted previously, Employee A's involvement with the Exchange is limited in scope, and was primarily that related to the gathering of member volume forecasting data and the distribution of this information for Monday morning conference calls of the producer membership of the Exchange and the distribution of the weekly FOB pricing report. It is not within Employee A's role to participate in the decision making process of the Exchange related to any activity contained in the Operational Policies; such decisions are made only by the producer members of the cooperative.

While Employee A was responsible for the auditing of Exchange members, this is the auditing of FOB sales invoices, not financial data. Any such audits could be conducted via the mailing of required documents, emailing of required documents, or on-site visits. Since 2005, the primary means of auditing has been other than on-site auditing, thus, nearly all Exchange business was conducted between the hours of 6:00 and 8:00 a.m. on Mondays (the date of the weekly conference call), or in the evenings or weekends. Thus, the limited scope of Employee A's responsibilities and the flexibility of providing these services outside of traditional business hours did not generate any conflict between Employee A's responsibilities to the Commission and those to the Exchange.

There are few instances where business of the Commission and business of the Exchange would intersect. For example, while the Commission funded governmental affairs, marketing and research efforts, the Exchange did not have such programs. This fact is documented by comparing the programs of the Commission as concurred by the Department of Food and Agriculture against the Operational Policies of the Exchange that are primarily limited to volume forecasting, restriction of certain grades, and reporting of FOB pricing, all programs that not found at the Commission.

Since Employee A's involvement in 2001, the only interaction of the two programs on given subject matter was related to the illegal packing of tomatoes, their sales being primarily through the 7th Street Produce Market in Los Angeles, and the need for increased surveillance with the goal of curtailing this illegal activity. Such practices were the subject of frequent discussion between the Commission and the Department. And, the Department of Food and Agriculture was clearly aware of the mutual concern of both entities, including litigation by the Exchange against certain individuals who were in violation of the State Standardization Regulations that applied to the marketing of fresh tomatoes through emails and personal discussions with Gary Manning, Dennis Manderfield, and Lynn Morgan, all employees of the Department.^{7 8 9} Further, the Department expressed support for the value of the surveillance program that was first initiated in 2005 subject to the memorandum of understanding between the two entities approved in the presence of Mr. Manderfield, and continued in 2006 through the Exchange.¹⁰ At no time did the Department, including the Marketing Branch or Standardization, express any concern to Employee A or the Commission's Board of Directors regarding the surveillance program or its funding mechanism. In fact, the Department of Food and Agriculture did not require a formal contract for services, only a Memorandum of Understanding for the programs undertaken in 2005 and 2006.

Contrary to the preliminary audit report, given the nature of the two programs being very different in scope, there were rarely opportunities for shared expenses. Where costs may have been common, the expenses were billed to the Exchange proportionately or in full.

For example, on an almost annual basis, Employee A would attend the Florida Tomato Conference. The Florida conference was structured similarly to the California Tomato Conference, with meetings of the various Florida-based organizations at the same site (Naples, Florida). For most of Employee A's attendance history Employee A's participation was limited to that of the Florida Tomato Committee – the Federal Marketing Order – that is in partnership with the California Tomato Commission in the USDA-Market Access Program. Thus, Employee A's attendance during this period of time was that of Commission business. However, when Employee A's participation was extended to that

⁷ Email to Dennis Manderfield, Gary Manning dated June 17, 200, Exhibit F.

⁸ Emails to/fr Lynn Manderfield, dated November 10, 2005; May 12, 2005, Exhibit G.

⁹ Email to Gary Manning, dated July 8 and July 21, 2004, Exhibit H.

¹⁰ Email from Kevin Masuhara, dated December 1, 2006, Exhibit I.

of a visitor during meetings of the Florida Tomato Growers Exchange or Florida Tomato Exchange, Employee A billed the attendance at the Conference to that of the California Fresh Tomato Growers Exchange, to eliminate any concerns related to Employee A's costs related to attending the Florida conference and the meetings of the respective Florida cooperative and association.

¹¹

In the Gonzales complaint and elsewhere, and alluded to in the preliminary audit report, allegations have been made of Employee A's providing CTC generated "pack out" reports or other proprietary information to the Exchange raising questions of possible conflict of interest. These allegations are without merit. The "pack out" report is generated by shippers directly through their own password protected access to the Commission's website, with these reports being made available to all members in summary format at approximately 12 noon, Monday to Friday. Gonzales Packing has refused to provide such data since 2004. Employee A has not provided any proprietary data of one shipper to any other member or the Exchange and does not have access to such proprietary "pack out" data. Further, the data is historical in nature; the Exchange, unlike the Commission, only deals with forward-looking volume forecasting as detailed in their Operational Policies. Thus, such historical "pack out" data is of no value to the Exchange.

As of December 31, 2006, Employee A's contract with the California Fresh Tomato Growers Exchange has terminated. The contract will not be renewed. The Exchange is discontinuing operations.

Exchange Surveillance Contracts with the CTC

There appears to be confusion in the Audit Report regarding the Memoranda of Understanding between the Commission and Exchange. The Commission and Exchange entered into general Memoranda of Understandings concerning the nature and terms of their relationship.

¹¹ GL of the California Tomato Commission; credit card records of Employee, previously provided and (available at the office of the Commission).

However, in addition, the Commission and Exchange entered into a separate Memorandum of Understanding in connection with surveillance activities. It is worth understanding the surveillance issue and the subject contracts in some detail because the auditors' gloss appears to be just that—superficial in nature.

The following explanation was provided by Employee A:

The Exchange considered the feasibility of funding for surveillance operations related to gunnysacking when it became apparent that no short-term solution was available from the Commission.

The Commission's action plan, including AB 649, would delay the implementation of food safety initiatives, which they (Exchange) viewed in conflict with the directive of FDA issued in February 2004.

Industry believed that tightening Article 43 would not be sufficient, that additional enforcement would be required. Thus, the Exchange decided that they would assess their members to provide the means to increase manpower by the State and selected counties, related to the enforcement of Article 43. The Exchange made this decision shortly after the CTC voted its support of the amended Article 43.

The Exchange members voted to support a supplemental assessment against all members based upon prior year production. The supplemental assessment raised \$158,429.67 that would enable funding of activities at the State and county levels that would support the enforcement of the California Ag Code specific to Standardization and the regulations governing the production and marketing of fresh tomatoes within California. These funds were accounted for separately from regular assessments and would be provided to the Commission as required to satisfy the MOU between the two entities.

The contracts established by the CTC for the Exchange per the MOU provided a cap on expenses; actual performance varied significantly from county to county.

The Exchange funds received from its members also supported the funds of an answering service that was used by any individual, in

or outside of the Exchange, who wished to report gunnysacking activity or any related activity that was in violation of the California code as it applied to fresh tomatoes.

Historically, the Exchange had previously entered into contracts with various counties in the 1990s. The Exchange, however, does not have the infrastructure as it did at that time, when the CTC provided manpower to the Exchange; thus, the Exchange sought an MOU with the CTC to contract with the counties and retain an answering service to relay complaints of illegal operations to the respective counties.

The Commission, at its May 18, 2005, meeting, attended by CDFA's Dennis Manderfield, approved an MOU with the Exchange to provide such services. At no time following the meeting did CDFA ever express any concern with the MOU. The MOU to provide services was signed by the Commission president and Chairman of the Exchange.

Contracts were established by the Commission with the respective counties and/or CDFA. The liability for the contract amount was that of the Exchange under the MOU. Counties and/or the State were aware of the joint funding mechanism through verbal communications.

Concurrently, the Exchange litigation moved forward against the gunnysackers, with one gunnysacker, Ricardo Mayer, of RomasRUs, who later agreed to an out-of-court settlement that included the paying of back assessments to the Commission. RomasRUs has since paid their assessments to the CTC.

The gunnysacker in question had been cooperative in detailing the scope of the illegal activity in the Los Angeles market, which we relayed to CDFA. We estimate that the revenue loss to the CTC from such activity in the amount of \$1,600 per day (25 loads x 1,600 boxes x .04 per carton).

Concurrently, the CTC moved forward with the amending of Article re; delays were frequent at CDFA due to concerns related to the regulations required and specific language, including trace back provisions, the role of the Office of Administrative Law, and issues related to the proposed MOU.

Amendments to Article 43 were subject to a public hearing in Salinas, California, on June 23, 2005; at this meeting, a number of

allegations were made by Gonzales Packing that were refuted by a number of industry members.

The Governor vetoed AB 649 at the end of the legislative session, thus curtailing hopes of industry to move inspection and GAP authority to the CTC effective 2006.

At the December 13 meeting of the Exchange, the general MOU with the Commission was terminated; this includes the termination of the MOU for surveillance activities.

At the conclusion of the program, the Exchange made three payments to the Commission in the amount of \$69,639.38 in fulfillment of the MOU. Two payments were made directly to the counties, as the MOU between the Exchange and Commission had been terminated as of December 31, 2005. Those payments were to Los Angeles and Fresno Counties, in the amounts of \$2,070.00 and \$16,353.97, respectively.

The remaining unspent funds were retained by the Exchange and provided the basis for 2006 funding of surveillance activities that are governed by an MOU between CDFA and the Exchange that was entered into in August 1006 by Rick Jensen on behalf of CDFA and Ed Beckman on behalf of the Exchange.

As is evident, the situation regarding surveillance, contracts and the interaction between the Commission, Exchange, CDFA, and various county governments was transparent, justifiable and did not implicate any misuse of Commission assessments.

Relationship Between Commission and the Foundation

The contemplated purpose of the California Tomato Research Foundation was to pursue proprietary research technology for the industry, distinguished from research provided at public universities which is publicly available. The Board of Directors approved the formation of the Foundation in open session in the presence of CDFA representative Dennis Manderfield.

The CDFA concurred with the 2006 budget, which included funding for the Foundation. No one posed any potential conflict of interest in, or otherwise objected to, the Commission's pursuit of proprietary research through the Foundation.

However, as it turned out, the Foundation never got off the ground. The Bylaws remain in draft form, and the entity remains stalled in the formation stage. There are few records, but for the draft bylaws previously provided, and no transactions beyond the Commission's preliminary exploration actually have taken place.

The Commission is aware of no evidence that Employee A "managed" the Foundation or that the Commission separately compensated Employee A in connection with the Foundation. See California Tomato Commission website for its purpose and contact/management of the Foundation. Neither is the Commission aware of Employee A otherwise receiving compensation related to the Foundation. Employee A has confirmed that he did not have managerial responsibilities at the Foundation nor did he receive compensation from the Foundation. Employee A further explains:

California Fresh Tomato Research Foundation

The California Fresh Tomato Research Foundation was proposed by Kahn Soares and Conway, the legal counsel of the California Tomato Commission, as a means to generate funds from other than assessments to support the research needs of the industry. The concept was based upon that being used in other industries – including the California avocado industry.

At no time has Employee A been formally associated with the organization or received any type of compensation or been promised any compensation for any services provided. To the best

of Employee A's knowledge, the Foundation never became fully operational.

Employee A's responsibilities were limited to that of interaction between the Commission and its legal counsel on issues related to creation of the Foundation and to identify fund raising mechanisms for the support of the Commission's research program. Such roles are within the parameters of Employee A's being CEO for the California Tomato Commission.

The principal concern raised in the Audit Report is that Employee A took a trip to Sicily, Italy, in connection with the Foundation to attend a world tomato conference (the 2005 Syngenta Tomato Conference) and that the Commission allegedly paid for it without reimbursement. The Commission's understanding is as follows. The 2005 Syngenta Tomato Conference was an invitation-only event. Based upon the explanation of Employee A, a member of the California Tomato Commission's Quality Task Force, Mr. Rod Jorgenson (Tomato Product Manager, Syngenta Seeds Company/Rogers Brand) invited Employee A to attend.¹²

The Commission was reimbursed for full fare coach airfare to and from Catania, Italy (see invoices to Syngenta for Employee A's airfare and the General Ledger and AR reports for payment by Syngenta to the Commission). In accordance with Commission policy, the Commission paid the difference between full far coach and business class. All hotel and meal expenses were paid for by Syngenta or Employee A with one exception. Due to an air traffic

¹² The Audit Report mentions that Foundation donors would receive a tax benefit and that royalties from Foundation projects would flow through the Foundation to fund other projects. This arrangement is similar to one in Florida. One such project which was discussed early on concerned the feasibility of proprietary breeding with a large seed company (Company E), with a share of industry purchases from Company E to be returned to the Foundation to support generic breeding at UC Davis. The trip to Italy was in connection with the contemplated project.

controllers' strike, Employee A had to remain in Italy an additional night,¹³ and those expenses were paid by the Commission. Please see Exhibit J.

Accordingly, the Commission funded the initial exploration of a Foundation, legal fees for draft bylaws, and a diminimis portion of Employee A's participation in the 2005 Syngenta Tomato Conference. The Commission has determined that it would be diseconomic and impractical to attempt to retrieve these small amounts, which amounts were justified in any event as consistent with its mandate to promote the California fresh tomato industry and a reasonable effort to further improve the industry.

Commission Conferences

The CDFA criticizes in principle the Commission's annual conferences. As demonstrated in detail below, the conferences served an important public service under the mandates of the statute and produced substantial public benefits. The majority of expenses related to the conferences were underwritten by third parties, and were not disputed by the CDFA auditors. Thus, the Commission's expenses were substantially leveraged by sponsorships thereby producing maximum benefits at minimal cost to the tomato industry and its growers and consumers. These public benefits are wholly ignored by the auditors in their unsupported conclusion that "we do not believe [conference expenses] to be in the best interest of the public." (Report, p. 3) Employee A has provided an overview of the conference purposes:

¹³ According to Employee A, the flight schedule was from Cantania to Rome to Munich to San Francisco. The strike resulted in a cancellation of all flights and the best, if not only, alternative was to spend the night in Rome and arrange for a flight to the U.S. the next day.

The conference is used to increase industry awareness and usage of Commission programs, to create awareness of emerging trends, and enable staff to finalize programs. The event is considered part of an overall marketing effort related to issues that financially impact its members not unlike other organizations and companies who consider the return on investment from such activities to be positive for the industry in general.

The issues addressed at the Conference are not available through other means, including Western Growers or other trade associations, as the focus at these venues is not "tomato specific." Over the years, the keynote speakers included: Bill Lyons, Secretary of the California Department of Food and Agriculture; Gus Schumacher, Undersecretary for Farm and Foreign Policy, USDA; Bruce Peterson, Vice President of Produce - Wal-Mart Stores; and, the conference has been well attended by representatives of government, including USDA-AMS, USDA-FAS, Ag Canada, Sagarpa (Mexico), (Cabo San Lucas 2004).

In addition, the following information was narrated by Employee C, an active participant on behalf of the Commission at Conferences:

Beginning in 2002, the Commission began a series of interactive educational programs for industry. During the 2002 conference, "What the Retailer is Looking For," consisted of a panel of top retailers from the U.S. and Canada, as well as an expert on consumer trends. This staff-moderated, interactive panel gave insight as to what the grower/shipper should do to stand out in the crowd of the tomato category and the produce section, as well as what fresh tomato quality areas needed to be improved upon for the retailer as well as the consumer. Panelists included Michael Mockler, Thriftway in Canada, Steven Junquero, Save Mart Supermarkets, California, Steve Lutz, The Perishables Group, Wanatchee, Washington.

In 2003, this series continued with a hands-on workshop of foodservice personnel from throughout the U.S. on what that sector is looking for in quality, pricing, and packaging. The workshop, "I'll Have What She's Having," was an in-depth look at how foodservice buyers and their repack suppliers are changing needs

and specifications for their restaurant customers. Panelists included Maurice Totty, Applebees; Greg Reinauer, Amerifresh; Bill Piper, Grant County Foods. This panel and presentation was also coordinated and moderated by staff.

The third workshop in the series, in 2004, was aimed at the sales arm of the grower/shipper equation: "New Dynamics of Buying and Selling," moderated by Ronnie De La Cruz of the Produce Marketing Association. This presentation was entirely coordinated by Employee C. Also, Employee C gave a presentation to industry during the General Session on domestic tomato movement and marketing trends for the 2003 season, and participated in the industry roundtable, "Growing Your Share of the Mexican Retail Market," with the Mexican trade. (Note: These materials were given to CDFA audit staff.)

As the issue of food safety grew, so did the Commission's commitment to keeping industry updated on buyer demands and concerns related to food safety, and moving forward to meet those demands. To that end, the conference programs were aimed specifically toward food safety issues for the 2005 and 2006 programs.

In 2005, Employee C coordinated and moderated a panel of food safety experts, including retail, foodservice, repacker and trade associations, as well as produced a comprehensive video outlining past tomato food borne outbreaks for the session. Employee C also gave a presentation on crisis management mistakes from past high-profile outbreaks, including Taco Bell and Chi Chi's Restaurants. The session's title was "Food Safety: Whose Responsibility is it?" Panel participants included Wal Mart, Darden Restaurants, united Fresno Fruit and Vegetable Association, Andrew and Williamson, Del Monte Fresh, and the Alliance for Food and Farming. (Note: These materials were given to CDFA audit staff.)

Continuing on the issue of food safety and successfully selling fruit into the foodservice sector, the Commission presented "Changing Trends in Foodservice Purchasing" in 2006, also solely organized, coordinated and moderated by Employee C. Panel participants included Yum! Brands (Taco Bell, KFC, Pizza Hut), Darden Restaurants (Olive Garden, Red Lobster), and Subway.

Employee C then presented at the State of the Industry seminar on current consumer trends within the tomato category, and a five year reflection on buying patterns. (Note: These materials were given to CDFA audit staff. A second copy is attached.)

See Exhibit K.

Unquestionably, the conference produced numerous benefits in education and promotion activities intended to enhance the California fresh tomato industry, consistent with the Commission's statutory purpose and mandate to educate, promote and advertise. Considering that the Commission paid for only a fraction of the costs of these conferences because of the sponsorships, the industry and public benefits far outweigh the Commission's costs. The auditors focus only what they call conference "losses," which they overstate in any case. (*See below*). But this misses the point. The amount characterized by the auditors as "Loss" more accurately represents only a small investment by the Commission which, when highly leveraged by the donations or sponsorships of underwriters, produces substantial public benefits.

The CDFA auditors expressed concern that expenses at the conference were not properly allocated and suggest that the information reported by the Commission is consequently misleading. On its face, this proposition is not correct since specific expenses directly related to Commission Board meetings and Exchange Board meetings taking place at the time of some of the conferences were separately and clearly allocated and disclosed, to accurately represent each activity.

As set forth by the independent auditor who audits the Commission's financial statements, the CDFA auditors are not correct regarding the reporting of Conference-related revenues and expenses:

The Draft Audit Report criticizes the Commission for not providing "clear transparency or disclosure of all conference related activity to all assessment payers of the CDFA." Specifically, the Draft Audit Report (pages 18-19) criticizes the Tomato Commission's financial statements for netting conference revenues against expenses and reporting the net amount on the financial statements and annual budgets. The Draft Audit Report substitutes the CDFA's auditor's judgment and recommends that "the Commission should ensure that all conference related income and expenses are fully disclosed at gross in the annual budget submitted to the CDFA for concurrence and the financial statements sent to all assessment payers."

Although the Draft Audit Report would reallocate some conference expenses from conference to travel or vice versa, there is no dispute that all expenses were recorded in the Tomato Commission's books and records. Apparently the Draft Audit Report and the Summary of Conference Receipts and Disbursements (page 15) was prepared from the Tomato Commission's books and records.

With regard to the decision to "net" conference receipts and expenses, it is important to note that this is not a revenue-producing activity for the Tomato Commission. During the CDFA audit, Mr. Carter explained the accounting treatment in a September 27, 2006, letter to Mr. Shackelford. Revenue and expenses are from an entity's major, ongoing operation. In the Tomato Commission's case, revenue would be from assessments and market access program grants. The Tomato Commission's major, ongoing operation is not hosting the annual conference. Indeed, the annual conference is not expected to make a profit, merely to break even. Accordingly, under Statement of Financial Accounting Concepts 6, the conferences were reported net, not gross. This was done, correct, in the financial statements. To show the conference at gross amounts would lead a reader to believe that the revenue from this activity is a "major, ongoing operation" of the Tomato Commission. It is not and, under accounting theory, should be reported at gross amounts.

Furthermore, the total amount involved is less than 3% of gross revenue and the deficits incurred for each of the annual conferences are (according to the CDFA's Draft Audit Report) less than 1% of the gross revenues. Finally, because all assessment payers were notified of the existence of these conferences and had the opportunity to participate, the Tomato Commission's judgment

to not report the gross amounts of revenue and expenses for annual conference does not decrease transparency or accountability and I is not misleading.

With regard to the allocation of conference expenses between "staff and board travel" and "conference expenses," this is a judgment by the Tomato Commission and its accounting staff. Although the CDFA's Draft Audit Report would reallocate approximately \$6,700 from Commissioner and Administrative Travel to the conference expenses, this is an immaterial amount when compared to the Tomato Commission's total revenue or its total expenses. Most importantly, the net amount was properly recorded as an expense item.

The auditors also question the Commission's long-standing practice of allowing some family members of staff to accompany them to conference-related events. As discussed in the following section regarding credit card charge changes, "personal" or family-related conference travel for the entire three-year audit period, is approximately \$28,000.

It is appropriate here to note that the Commission requested and received the following explanation from Employee A regarding personal or family conference-related expenses:

On the issue of family travel, it is manifest that no improprieties occurred with respect to Employee A. It has long been CTC practice and policy that family travel expenses were covered as part of the California Tomato Conference and indeed all of Employee A's expenses in this regard were fully disclosed to and approved by the CTC Board.

Further, the expenses were wholly justified under the particular circumstances in question. By way of background, the California Tomato Conference has been in existence since 1986. Annual attendance at the conference has ranged from approximately 100 to nearly 300 individuals. The attendees are not limited to tomato producers or members of the Commission. The event is open to all interested parties and serves as a means to further advance

programs of the Commission and to address issues that may economically impact the industry.

The conference was typically organized by staff with little, if any, outside help. Given the small size of the Fresno staff, no more than five individuals, it had been customary practice to enlist the help of family members to assist in the preparation of meeting packets distributed to all attendees and to help with on-site coordination. There were times during the conference, that the multitude of events simply demanded additional support and that support was from the attending family members.

It has long been practice and policy, that family members were invited to attend the conference and such charges would be billed back against the conference. This is largely in exchange for the work prior to, during, and post conference. In Employee A Beckman's situation, his son helped with the set-up of the golf tournaments, helped to assemble registration packets, monitored the hospitality suite, and ran errands for the staff. His daughter provided babysitting services, monitored the hospitality suite, and ran errands for staff. At some conferences, his wife served as a tour host on spouse functions.

The Conference, could have as an alternative, hired additional on-site staff from destination management companies. The Commission could have also contracted out the preparation of conference materials. However, those are viewed as expensive options and are not in keeping with the past practices of the Conference, as it was first established.

At no time in the existence of the Conference, had Employee A been advised by the Department of Food and Agriculture that such practices may represent a gift of public funds. As the family members in question provided valuable services that otherwise would have required payment to outside vendors, their attendance does not represent a gift. Finally, it should be noted that the 2006 conference recorded a profit. Thus, there was no use of public funds in support of the conference, and therefore, any repayment by staff would represent additional profit, not a repayment of CTC funds.

In short, the amount of Commission funds used to pay for family-related travel in connection with the conferences is less than \$30,000 over a three-year period. The conferences

produced substantial benefits and the family members often provided services for which the Commission otherwise would have had to pay third parties. The conferences provided excellent opportunities for networking for which the family-friendly environment was beneficial. Together with the substantial industry benefits produced by the conferences described above, even these “personal” costs are justified. The Commission was aware that similar programs existed in other industries and had no reason to believe them improper in any way. None of these factors appear to have been taken into consideration by the auditors in leveling a blanket disapproval of these important programs.

Credit Card Charges

The auditors found that the Commission did not keep adequate documentation for credit card charges because it did not keep individual invoices, receipts, and hotel folios, for example. While the CDFA auditors referenced credit card company statements, it should be noted that such statements are detailed in identifying and summarizing the charges. It is also significant that the Commission was advised by its independent auditor that the credit card statements were adequate for record-keeping purposes. Nevertheless, the implication which arises from the Report’s reference to total credit card charges of “approximately \$653,000” during the audit period is that the entire amount is suspect. That simply is not the case. Even without individual receipts, the credit card statements, along with the staff’s explanations, show that the vast amount of the credit card charges were for Tomato Commission business purposes and were reasonable. Many of the staff’s explanations were supported by documentation other than invoices and receipts, such as documentation of the events or activities pursuant to which

the charges were incurred. And, as noted by the CDFA auditors, many invoices were retrieved from third-party vendors to the extent practicable. While the Commission's practices may have been less than ideal, there still is substantial support for the charges and no basis for assuming impropriety.

Please note that the employees continued to receive back-up for credit card charges after the close of the audit investigation period. To avoid confusion, that additional back-up is not enclosed here but is available upon request.

It is worth noting that the liability on the American Express accounts was Employee A's personally, not the Commissions. Employee A confirmed this by inquiring of American Express "[w]ho has the liability of this amount—is it the Commission or myself personally?" American Express responded "[p]lease know that the liability on this account is yours personally." Please see Exhibit L.

Moreover, of the total \$653,000 in credit card charges over the three-year period, the Commission's employees have determined that a total of less than \$28,000 is attributable to personal or family expenses, primarily in connection with conference-related travel. The identification and calculation of these personal or family expenses and the substantial justification for the remaining expenses show that the Commission's expenditures were proper. This is a prime example of the Auditors referring to a total, \$653,000, when only a fraction of that amount ultimately is in issue.

The Commission requested and received information from each of the four employees in question as to a breakdown of family or other personal credit card charges incurred in connection with the conferences and pre-site visits.

The total for Employee A is \$6,840.78. (See Exhibit M.) Employee A has offered as follows and the Commission has determined to accept the offer:

Notwithstanding the foregoing, in light of the CDFA's recently announced stance that the family expenses allegedly represent a "gift of public funds," Employee A has agreed to repay the amounts in question out of his own pocket. This action is being taken as a gesture of good faith in order to settle and resolve any controversy on this issue and should not be interpreted as an admission of responsibility or culpability on the part of Employee A, which responsibility or culpability is expressly denied.

Employees B, C, and D reported family or other personal expenses related to conferences in the respective amounts of \$6,032.70, \$1,330.85, and \$2,734.29. Please see Exhibits N, O, and P. These employees have stated their position that they were acting under express Commission authority, and within the scope and course of their employment, and that they would defend against any action brought against them by the Commission for reimbursement. In addition, these employees each have reported that their respective spouses and significant others performed services for the Commission at the conferences, a fact confirmed by the former CEO and several Board members. Also, the employees indicated that they worked substantial overtime at the conferences that was not compensated.

Because the amount at issue for these three employees is \$10,097.84, the Commission concluded that the cost of legal action to collect from these employees would

exceed the reimbursement amount, and there always is some risk that the employees may prevail and/or assert offsets for services rendered by family members and/or for their overtime. In light of the cost-benefit analysis, the Commission does not believe its best interests are served by proceeding against these employees.

Use of Private Aircraft Charters

The Commission agrees to perform cost-benefit analyses when comparing commercial airfares to use of private aircraft, as it has done in the past. Of the 13 charters identified by the auditors, three were funded by USDA-MAP funds. MAP does require a cost analyses that illustrates the cost savings as compared to commercial airfare. One charter (number 9), for example, transported funded researchers to a tomato production region that is 175 miles from the nearest airport. It is perhaps more readily apparent that private aircraft is more cost-effective when passengers, such as attorneys, are billing by the hour as was the case in two of the identified trips. However, even in those instances where passengers, such as Board or industry members, were not billing an hourly rate, their time away from their businesses is a significant factor, when considering the additional time and inconvenience of commercial airline scheduling.

Employee Receivables

The Report indicates that Commission employees charged personal expenses to their American Express cards in violation of internal policy. However, the Report also indicates that the Commission provided the CDFA auditor with its General Ledgers back to 1999 clearly showing such charges and demonstrating the transparency of the practice. The auditors

determined that “[t]hese personal charges were not further explored by our office since the Commission established an Accounts Receivable for each of the employees which were eventually paid off by them.” Report, p. 24.

Under the circumstances, the Commission agrees to the recommendations to disallow staff making personal charges to Commission credit cards and to strengthen applicable internal controls, while underscoring that it is aware of no attempt to conceal the personal charges or to not repay them, as the General Ledgers and actual repayment evidence.

Sponsorships

The Commission is alleged to have paid \$45,000 to Individual A for advertising on a race truck and that Board Member A was “a co-driver.” The referenced race truck was an expenditure approved in connection with MAP, and paid for with MAP matching funds. MAP’s approval of the expenditure is fully documented and the most recent MAP audit resulted in no reportable findings.

The promotion of California fresh tomatoes at well-attended racing events is consistent with the Commission’s statutory purpose. The liaison for the Commission with the Market Access Program is Bryant Christie Inc. Its representative Ms. Amy Thompson has explained as follows:

I am writing to provide more information about the eligibility of the Baja advertising activity.

Advertising is generally allowed under the Market Access Program (MAP). However, because this was a new activity, I still contacted Elizabeth Mello at the Foreign Agricultural Service (FAS) to obtain her approval prior to CTC moving ahead with the Baja advertising opportunity. Ms. Mello was our Marketing Specialist at that time. To explain, Marketing Specialists are the first points of contact for cooperator groups such as the California Tomato Commission, and all questions regarding Market Access Program (MAP) eligibility and rules are directed here. While marketing specialists may seek guidance from others in the agency, communication on all matters comes back directly from them. Ms. Mello approved the advertising for Baja through an email communication. A copy of this electronic correspondence is attached.

The Baja advertising activity was later audited as part of the California Tomato Commission's MAP audit in September 2005 by FAS Compliance Review Staff. This 2005 audit was a comprehensive audit that included review of each invoice and related documentation from 2002 through August 2005. At that time, Compliance Review auditors determined that this activity was in full compliance with MAP regulations. I have attached the complete letter from Compliance Review Staff that outlines other detailed findings but makes no reference to the Baja advertising activity.

Given the pre-approval of the activity and subsequent confirmation through the MAP audit, it can be concluded that this was an eligible activity. If you should require any further clarification, please do not hesitate to contact me.

Please see separate submission of Board Member A.

In addition, as set forth in the Declarations of Board Member A and Individual 1, Board Member A does not now have, nor has he ever had, a financial interest in the race truck or company which owns it. *Please see* Board Member A's separate submission.

Total Salary Paid to Employee A

The Commission has consulted the 2005 Salary Summary for Chief Executives of California Marketing Programs, based on salary information collected by the CDFA. The 2005 Salary Summary shows that the compensation paid by the Commission to Employee A is well within the range of salaries surveyed. Even if compensation from other sources is taken into consideration, the total compensation to Employee A remains within a reasonable range. However, it is outside the scope of the Commission's responsibility to determine the appropriateness of compensation derived from independent sources. In any event, Employee A also has provided estimated overtime and out-of-pocket expenses for which he did not seek reimbursement or compensation. *Please see Exhibit Q.*

Payment of Unsupported Accrued Vacation Hours

The Commission acknowledges some confusion in the documentation of its Employee policies and agrees to improve its internal controls in this regard. However, it has been the Commission's routine practice to permit employees to cash out accrued vacation time and, to the extent it was necessary for them to do so, the Commission's Board has effectively approved the employees' receipt of this benefit and determined not to seek reimbursement. Each of the subject employees has advised the Commission that they would defend against any action brought by the Commission to retrieve any or all of the payments to them. (For the audit period: Employee A--\$19,375; Employee B--\$1,138; Employee C--\$8,750; Employee D--\$916) further supporting the Commission's decision not to seek reimbursement. Please see Exhibit R for the employees' analyses of their accrued vacation time during the audit report.

The Commission's independent auditor observes:

The Draft Audit Report notes that . . . , one version of the Tomato Commission's Employee Handbook prohibits the payment for accrued but unusual vacation time. As noted in the Draft Audit Report, another version of the Employee Handbook does not prohibit these payments.

As part of his audit procedure, Mr. Carter asked each of the four employees (The total number of persons employed by the Tomato Commission) whether they had accrued vacation time as of February 28, 2006. In addition, Mr. Carter requested the employees' W-2's for wages and vacation pay on an annual basis. Each employee stated that as of February 28, 2006, they had no accrued vacation. As noted above, an auditor may rely on his "observations" or "inquiries" as the competent evidentiary basis for his opinion about the financial statements under audit.

Violation of Open Meeting Laws

The CDFA questions whether a dinner involving some Board members and others qualified as a Board meeting subject to notice and open meeting requirements. To the best of the Commission's knowledge after inquiry, the auditors obtained information from a Commission staff employee who did not attend the dinner to the effect that "Board business" was discussed. After consulting with other employees and Board members who did attend the dinner, it appears that the dinner was to network and strengthen relationships, a reasonable business purpose, and there were only general comments made about the future of the California fresh tomato industry during the evening. Nonetheless, as a gesture of good faith, the current chairman of the Board has offered to reimburse the Commission for the wine at the dinner and the Commission has accepted his offer to do so.

Violation of the Public Contracts Code

The auditors identify several of the Commission's contracts with third parties, suggesting that they should have the subject of competitive bidding. There is, in the first instance, a real question as to whether such requirements apply to the Commission.¹⁴ But,

¹⁴

The CDFA auditors here seem to assume an obligation on the part of the Commission as a public entity to comply with the Public Contract Code. To the contrary, in *San Diego Service Authority for Freeway Emergencies [SAFE] v. Sup. Ct. of San Diego Co.* (1988) 198 Cal.App.3d 1466, the Court of Appeal explicated the necessary legislative mandate for application of such a rule – a mandate here plainly lacking:

Notwithstanding the powerful purposes served by competitive bidding, there is no all-pervasive public policy that requires all public entities to engage in that practice. Rather, the Legislature imposes competitive bidding requirements on public entities within its purview when the Legislature determines it is in the public interest to do so. *Id.*, at p. 1469.

In *San Diego, supra*, the Court of Appeal characterized the sole issue as "whether San Diego SAFE is required to apply competitive bidding principles," and then opined that "to prevail [the party arguing competitive bidding is required] must establish a legislative restraint on [the entity's] ability to contract. The statutory scheme providing for the establishment of service authorities . . . does not contain a specific statutory requirement that service authorities engage in competitive bidding in awarding contracts." (*Id.*, at p. 1469.) Nor, the court held, could such restriction be implied:

The enabling legislation does not set forth any limitations on a service authority's ability to contract. We must presume that if the Legislature had wanted to require competitive bidding in all instances it would have done so specifically. [Respondent] has failed to cite any example where the Legislature imposed a competitive bidding requirement by other than a specific statutory provision. *Id.*, at p. 1472.

A similar conclusion is inescapable in the present case. Food & Agriculture Code, section 78652 provides:

The commission shall be, and is hereby declared and created, a corporate body. It shall have the power to sue and be sued, *to contract and be contracted with*, and to have all and possess all the powers of a corporation. *Italics added.*

Here also, then, the enabling legislation does not set forth any limitation on the Commission's ability to contract, nor under *San Diego* can such limitation be implied.

Article 3 of the State Contract Act, mandating competitive bidding, provides that it shall apply to any "state agency." (Pub. Contract Code, § 10335, subd. (a).) "State agency" is therein defined as follows:

"State agency" as used in this article, means every state office, department, division, bureau, board, or commission, but does not include the Legislature, the courts, or any agency in the judicial branch of government. Pub. Contract Code, §10335.7.

First, labeling by the Legislature as a "commission" is simply *not* dispositive legally. In determining whether or not an entity was an agent of the state, courts of appeal have held that the determinative factor "is the relationship between the entity and the state, not the label attached to the entity...." (*Lynch v. San*

moreover, most if not all of the contracts identified by the auditors were competitively bid by virtue of their relationships to the Market Access Program. Bryant Christie representative Amy Thompson, by letter dated January 10, 2007, writes “to provide evidence of competitive bidding practices undertaken by the California Tomato Commission.” See Exhibit S commencing at Bates-stamp number BC00030, which also includes additional information regarding MAP-funded activities of the Commission. Moreover, the auditors’ analysis of amounts paid on the contracts is inaccurate and misleading in that the total amounts represent totals for more than one year. In addition, it is common practice, consistent with governing law, that requirements of competitive bidding are relaxed as to professional engagements, such as attorneys with particular expertise. In sum, even if competitive bidding practices were required, the Commission is in

San Francisco Housing Authority (1997) 55 Cal.App.4th 527, 536.) Moreover, California courts have further held that an entity may be a state agency for one purpose but not for other purposes. (*Id.*, at p. 535.)

As noted above, no case appears to be directly on point as to whether the Commission is a state agency. However, the analysis courts have used in determining whether an entity was a state agency – and thus subject to sovereign immunity under the Eleventh Amendment – is instructive here, since both competitive bidding requirements and the Eleventh Amendment serve similar purposes: protection of the public fisc.

In *Lynch v. San Francisco Housing Authority*, *supra*, 55 Cal.App.4th 527, the court considered the most significant aspect of the Eleventh Amendment analysis to be the vulnerability of the state’s purse; i.e., if the state is liable for debts or judgments against an entity, then it is more likely to be considered a state agency. (*Id.*, at p. 539.) There, the court concluded that “[t]hus, the statutes do not establish as a matter of law that the state must pay any judgment in this case, a conclusion that would have supported a determination that a housing authority is an arm of the state.” (*Id.*, at p. 540.) The Ninth Circuit considers five questions when resolving Eleventh Amendment issues:

[W]hether a money judgment would be satisfied out of state funds, whether the entity performs central government functions, whether the entity may sue or be sued, whether the entity has the power to take property in its own name or only the name of the state, and the corporate status of the entity. *Id.*, at p. 533.

Here, the Legislature has specifically disclaimed any liability for the acts of the Commission or its contracts. (Food & Agr. Code, § 78657.) The operations of the Commission are funded not by industry assessments. (§ 78676.) The Commission must even reimburse the Secretary for any expenses incurred in carrying out his duties toward the Commission. (§ 78644.) Clearly, the Commission is financially independent from the State, which cannot be held liable for Commission debts as a matter of law.

Consideration of additional factors also leads to the conclusion that the Commission is not a state is not subject to competitive bidding requirements: The Commission serves not a central government function, but rather supports a private industry whose well-being indirectly benefits the people of the state. (§§ 78609.) The Commission can sue and be sued. (§ 78652.) And the Commission was specifically created as a corporate body with all the powers of a corporation. (*Ibid.*)

substantial compliance and, in any event, there have been no demonstrated improprieties, overcharges or lack of transparency.

Public Records Act

The Commission acknowledges that its records should have been more readily accessible to the public in organized fashion and will agree to improve in the future. However, the Commission has responded to all Public Records Act requests, produced thousands of documents in connection therewith, and has not intentionally withheld public information from anyone.

In addition, plaintiff in the *Gonzales* litigation has made allegations that documents either have been withheld or were too heavily redacted in the Commission's production of roughly 10,000 documents to its counsel under the Public Records Act. Counsel for the Commission requested a complete copy of what the Commission produced to Gonzales' counsel before a system of bates-stamping began to be employed, at counsel's expense, to review that portion of the production with a view toward resolving any issues. Those documents produced with bates-stamps had little redaction, if any, and are easily tracked. However, several people were involved in the prior, initial production and, for those documents produced prior to the use of bates stamping, there is some confusion. Gonzales' counsel initially agreed but has since refused the Commission's review of the documents. The Commission and its counsel remain willing to review the earlier production and to remedy, if necessary and appropriate, any omissions in production, if any, and any redactions which may be removed, if any.

Auto Allowances

As summarized by the independent auditor:

The CDFA's draft audit criticizes the Tomato Commission for paying monthly car allowances and not including these car allowances on W-2s. The Draft Audit Report recommends that the "proper taxing authorities" ensure that taxes are paid on any employee car allowances.

In this regard, Internal Revenue Service Form 2106 provides a detailed explanation of how to report, on an employee's personal tax return, the allocation between miles driving for business use and personal use when the employee receives an untracked car allowance. Although employee car allowances should be included on a W-2 form, the employee nevertheless can utilize Form 2106 to report a car allowance.

Employees A and C received automobile allowances which were reported on Form 2106. Please see Exhibit T. While the employees do not wish for their tax documents to be part of the public record, they are willing to verify this information by submitting the actual forms and back-up on a confidential, non-public basis.

Pregnancy Leave Policy

The Commission again acknowledged that the documentation of its employee policies was confusing. However, for the 311.76 hours which were coded as Employee D's maternity leave, she worked 113.5 hours. Of the remaining 198.26 hours, Employee D had sufficient sick leave and vacation time to cover the additional hours. Thus, there was no overpayment to Employee D and the Commission Board has approved the payment and determined not to seek reimbursement.

Key Recommendations

- Although not listed as a key recommendation, the Commission has sought reimbursement from the Exchange of items identified by the auditors.
- Due to the seriousness of the issues raised, the Commission should contact the proper authorities so that investigations into these issues may be performed.

The Commission's investigation has not indicated to the Commissioners that the Commission's employees engaged in any conduct that was intentional, in bad faith, or otherwise inconsistent with the Commission's statutory purpose.

Accordingly, and in light of this response, the Commission does not believe that any referrals are warranted or would serve the ends of justice.

- The Commission should ensure all conference related income and expenses are fully disclosed at gross in the annual budgets submitted to CDFA for Concurrence and the financial statements sent to all assessment payers.

The Commission does not object in principle to a change in the reporting of conference-related expenses, so long as it comports with applicable accounting standards. Please see Response of Commission's independent auditor, Jeffrey Carter in his separate submission.

- The Commission should review all prior year conference related expenses and determine the total amount spent on the family members and friends of employees and the personal amounts spent by employees. The Commission should establish an accounts receivable and seek reimbursement of these expenses.

The Commission has requested and received from the employees in issue a breakdown of family related expenses. The Commission has accepted the offer of Employee A, without any admission of liability on his part, to reimburse his family-related expenses in connection with the conferences. The Commission has determined, as discussed above, that it does not believe it would be in the best interests of the Commission to pursue legal action against the remaining employees.

- The Commission should operate their business activities in the best public interest.

The Commission agrees to this recommendation.

- The Commission should keep adequate support for all expenses incurred. At the very least the Commission should ensure that a receipt/invoice is kept on file along with the names/business conducted, if appropriate.

The Commission agrees to this recommendation.

- Prior to contracting for the use of a private aircraft for travel related purposes, the Commission should perform a detailed cost-savings analysis that documents and demonstrates the necessity and benefit expected in using assessment dollars" to charter a private aircraft. The analysis should clearly identify the savings expected to occur in chartering a private aircraft versus other travel options.

The Commission agrees to this recommendation.

- The Commission should not allow its staff to use Commission credit cards for personal use.

The Commission agrees to this recommendation.

- The Commission should strengthen its internal controls over the use of these credit cards.

The Commission agrees to this recommendation.

- The Commission should contact the federal government to determine the "appropriateness" of the use of federal funds, specifically as it relates to Board Member A and Company C.

The Commission has contacted its liaison to the Federal Market Access Program which has confirmed that the expenditure was appropriate and does not believe that a referral is warranted.

- The Commission should verify that the total salary paid to Employee A from 2003 through 2006 is appropriate.

The Commission agrees to this recommendation and has done so.

- The Commission should collect reimbursement from any employee who was paid for their vacation time in violation of their own internal policy.

The Commission does not believe it is in its best interests to pursue legal action against the employees.

- The Commission should seek further guidance from the proper authorities on handling a violation of an open meeting law. The Commission should disclose all business meetings to the public in accordance with the appropriate open meeting laws.

The Commission agrees that it should disclose all business meetings to the public in accordance with appropriate open meeting laws, but believes it has done so.

- The Commission should seek guidance from the proper authorities as it relates to its violation(s) of the Public Contracts Code.

The Commission does not believe it has violated the Public Contracts Code, if it even applies to the Commission.

- The Commission should ensure all executive committee minutes are signed and dated by one of the three Board Elected Officer's along with the President of the Commission.

The Commission agrees to this recommendation.

- The Commission should ensure that all official accounting records, including certified ☐ copies of Board Minutes are centrally located and easily accessible to the public.

The Commission agrees to this recommendation.

- The Commission should adhere to the rules of the Public Records Act. In order to accomplish this, the Commission should have all records readily available to the public.

The Commission agrees to this recommendation.

- The Commission should contact the proper taxing authorities to ☐ ensure the Commission properly tracked and reported its employee's car allowances. Furthermore, the

Commission should require that employees submit monthly travel logs that indicate the business mileage driven and/or the actual maintenance incurred.

The Commission believes, based upon the information provided, that the car allowances have been properly reported. The employees in question have personal records which support the allowances. Notwithstanding, the Commission agrees to this recommendation.

- The Commission should contact the proper authorities responsible for determining whether the amounts paid to Employee D are appropriate. This will ensure that the Commission is not providing Employee D with a gift of public funds.

The Commission has determined with the assistance of legal employment counsel that the amounts paid were appropriate.

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Conclusion

The California Tomato Commission has responded in good faith to the Audit Report and stands ready to discuss its response and address any remaining concerns the CDFA may have.

Dated: February 16, 2007

Respectfully submitted on behalf of the California
Tomato Commission

By: Kathleen A. Meehan
Kathleen A. Meehan
BAKER, MANOCK & JENSEN

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CDFA EVALUATION OF RESPONSE

A draft copy of this report was forwarded to the management of the California Tomato Commission via their legal counsel for their review and response. The Commission's response addressed the findings in the report and stated their plans for implementing each recommendation. However, our office has reviewed their response and in order to provide clarity and perspective, we have provided a few general comments and more specific comments as to each of their responses.

Throughout our report, our office made reference of many issues that the Commission chose not to specifically address; conflicting MOUs between the Commission and the Exchange, missing amendments to the MOU, no explanation for independent contractor agreements that were clearly signed at different times, a letter written by Employee A to Individual #3 that has inaccurate information, and other points. Based on the information contained in our audit report and the Commission's decision not to report this information to the proper authorities, our office will ensure that the proper authorities are notified.

Within the Commission's response, it makes inaccurate assumptions and analysis that need further clarification to put them in proper perspective. On page 5 of its response, the Commission states,

"During the time period covered by the audit, approximately 44 months, total expenditures of the Commission amounted to roughly \$7 million. Of that amount, the Commission has approximated that only 1% of those expenditures are actually at issue in the audit report"

This statement highlights a lack of awareness of the limited scope of our engagement. The limited scope was due to various reasons, including but not limited to, the Commission's inability to provide adequate documentation in a timely manner which resulted in multiple delays during the audit. For example, most of our audit time was consumed with trying to understand the relationship between the Commission and the Exchange and also gathering information regarding expenditures made on the Commission's credit cards. This was a direct result of the Commission's inadequate record keeping.

Our office estimates that 40% of the \$7 million dollars were for governmental affairs, international, research, and other reimbursable related expenditures. Our office did not audit the performance of these contracts as stated on page 29 of our audit report:

"Our office did not conduct an audit of the performance of these contracts based on the amount of time it was taking our office to receive the credit card detail."

Furthermore, our office states on page 20 of the audit report:

"Due to the enormous amount of charges, and realizing the anticipated hardship that the burden of securing old receipts would place on Commission employees, we provided a sample of eight pages summarizing material charges that the four employees needed to gather"

actual receipts for. The four employees sent us additional support on November 14, 2006. However, our review indicated that a majority of the charges were still not supported by original receipts. Instead the employees provided us written explanations, letters sent to vendors requesting duplicate receipts that the vendors responded by saying that a receipt/invoice could not be provided and other attempts to justify the expenses they had incurred. However, without the proper support, we are still unable to determine whether numerous charges for meals and lodging were reasonable.”

For the audit period, the total charges made on credit cards by all employees amounted to approximately \$653,000. In total, this is less than 10% of the \$7 million dollars in expenditures. However, the Commission could not provide us with all of the support that we requested for this limited amount of 10%. In its response, the Commission states on page 38,

“Please note that the employees continued to receive back-up for credit card charges after the close of the audit investigation period.”

Furthermore, on September 29, 2006 our office submitted a list of 53 questions in regards to payment of \$240,000 made by the Commission to outside parties. Nearly half of this amount related to services provided by contractors. As stated above, we did not audit the performance of these contracts.

Finally, it should be noted that the Commission agrees to the majority of our recommendations and therefore we will limit our response to areas in which we do not feel the Commission adequately addressed our recommendations. Please see below for our specific responses.

Recommendations 1 and 2 – The Commission stated that their investigation did not indicate to the Commissioners that the Commission’s employees engaged in any conduct that was intentional, in bad faith, or otherwise inconsistent with the Commission’s statutory purpose. Therefore, the Commission states that no referrals will be made to the proper authorities. Based on all of the information contained in our report, our office does not feel the Commission adequately addressed our recommendation and therefore our office will ensure the proper authorities are notified of our concerns.

Recommendation 3 and 7– The Commission stated that Employee A has agreed to reimburse the Commission for his family-related expenses in connection with the conferences. The Commission will not seek legal action against the remaining employees. Our office requests that the Commission establish an accounts receivable and seek reimbursement for the amounts that appear to be a gift of public funds from these employees whether or not legal action will be required.

Recommendation 4 – The Commission admits that it does not object in principle to a change in the reporting of conference-related expenses, so long as it comports with applicable accounting standards. At issue with the Commission is the fact that the annual conference revenues and expenses were netted together and presented in their annual financial statements. Furthermore, the Commission reported revenues and expenses on their budget as \$0 that was submitted to CDFA’s Marketing Branch. In our opinion, both of these

presentations could mislead a reader of either of these reports which is at the core of our exception with this practice. Since our office continues to disagree with the Commission, our office will attempt for the final time to assist the Commission in understanding our position.

In order to determine the appropriate accounting of the Commission's annual conferences, one must determine whether the annual conferences are part of the Commission's ongoing major or central operations and activities; that is, from activities such as producing or delivering goods, rendering services, lending, insuring, investing, and financing as referenced in Statement of Financial Accounting Concepts No. 6 as pointed out by the Commission's Certified Public Accountant.

Our office believes that the annual conferences are part of the Commission's ongoing central operations and therefore the revenues should be reported at gross. We based our decision on Food and Agriculture Code, the Commission explanations, and evidence provided by Employee A.

Our understanding of the conferences was they were intended to assist the Commission in performing their statutory responsibilities under Food and Agriculture Code. Our office is in agreement with the Commission and Employee A as to the importance of these conferences. Although we may disagree as to the efficiency of these conferences and some of the expenses associated with the conferences, our office does agree that the conferences are yet another avenue for the Commission to carry out their statutory responsibilities. The Commission carries out programs of education, promotion, marketing, and research relating to tomatoes. There is little doubt that the conference is intended to discuss these issues.

To support this, Food and Agriculture Code Section 78604 states,

"The establishment of the commission is necessary for the efficient creation and management of a research program to develop improved varieties of tomatoes, an integrated approach to control pests and diseases common to tomatoes, and more efficient cultural practices. In addition, the Commission is necessary to carry out the California tomato industry's commitment to the efficient development and management of a national and international advertising and promotion program which, combined with the research program, will enhance the competitiveness of the California tomato industry within the national and international marketplace."

The Commission and Employee A also state in their audit response on page 30,

"As demonstrated below, the conferences served an important public service under the mandates of the statute and produced substantial benefits."

Again on page 31,

“The conference is used to increase industry awareness and usage of Commission programs, to create awareness of emerging trends, and enable staff to finalize programs. The event is considered part of an overall marketing effort related to issues that financially impact its members not unlike other organizations and companies who consider the return on investment from such activities to be positive for the industry in general.”...“The issues addressed at the conference are not available through other means, including Western Growers or other trade associations, as the focus at these venues is not “tomato specific.”

Again page 32 states,

“As the issue of food safety grew, so did the Commission’s commitment to keeping industry updated on buyer demands and concerns related to food safety, and moving forward to meet those demands. To that end, the conference programs were aimed specifically toward food safety issues for the 2005 and 2006 programs.”

And finally page 33 states,

“Unquestionably, the conference produced numerous benefits in education and promotion activities intended to enhance the California fresh tomato industry, consistent with the Commission’s statutory purpose and mandate to educate, promote and advertise.”

Based on FAC, the Commission’s explanations, and Employee A’s explanations, our office is in agreement with the notion that the conferences are part of the Commission’s central operations. This however is at odds with the way in which the Commission’s CPA views the conferences.

On page 34 the Commission includes an explanation as follows,

“With regard to the decision to “net” conference receipts and expenses, it is important to note that this is not a revenue producing activity for the Tomato Commission...In the Tomato Commission’s case, revenue would be from assessments and market access program grants....To show the conference at gross amounts would lead a reader to believe that the revenue from this activity is a ‘major, ongoing operation’ of the Tomato Commission. It is not and, under accounting theory, should be reported at gross amounts.”

Our office believes this is a misunderstanding of the objective of levying an assessment on producers and handlers of tomatoes. The reason an assessment is levied on producers and handlers is to authorize the Commission to expend funds for the purpose of carrying out their statutory obligations. Based on the comments from the Commission and Employee A, as well as our interpretations of the FAC, the conferences are another avenue by which the Commission carries out their statutory obligations. These conferences appear to be a part of the Commission's central ongoing operations, and therefore revenues and expenses from conferences would be reported at gross.

If our interpretation of SFAS No. 6 is correct, then the Commission understated revenues and expenses on their financial statements.

Recommendation 5 – Although the Commission agrees with our recommendation, our office would like to clarify our original finding. Our office is not taking exception to the fact that the conferences may have been effective to the Commission. Our exceptions are with the apparent inefficiencies and inappropriate expenses of the conferences. A conference can be effective and inefficient at the same time. However, distant locations, unnecessary expenses, and possible gift of public funds will not be accepted as being in the best interest of the public.

Recommendation 11 – The Commission stated that it had contacted its liaison to the Federal Market Access Program which has confirmed that the expenditure was appropriate and does not believe that a referral is warranted. Our office has not been provided with any evidence of whether the federal government found Board Member A's participation in driving the race truck for Company C to be acceptable or not. Therefore, our office will notify the proper authorities of this issue for their determination. Our office is still concerned that the Commission did not proactively address the appearance of a possible conflict of interest.

Recommendation 15 – The Commission stated that it does not believe it is in the best interests to pursue legal action against the employees for the inappropriate payments made to their employees. However, our office mentioned nothing about legal action. Our office recommends the Commission notify the employees of the inappropriate payment, establish accounts receivable and seek reimbursement.

Recommendation 16 – The Commission stated that it does not believe a violation of the open meeting laws were violated at the dinner in question. However, our office requested that the Commission seek further guidance from the proper authorities. Since the Commission has not sought guidance from the proper authorities, our office will provide the information to the proper authorities.

Recommendation 17 – The Commission stated that it did not violate the Public Contracts Code (PCC). The Commission implies that the PCC may not apply to it. Since our office recommended that the Commission seek guidance from the proper authorities and it did not, our office will provide this information to the proper authorities in order for a determination to be made regarding applicability of the PCC.

DISPOSITION OF AUDIT RESULTS

The findings in this report are based on fieldwork my staff performed between September 11, 2006 and November 3, 2006.

This report is intended for the CDFA and the Commission for their review and action. However, this report will become a public document and its distribution will not be restricted.

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